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AMERICAN BAR ASSOCIATION JOURNAL

January 1944



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There is . . .  
"a time to laugh" . . .

*Ecclesiastes 3:4*

The late Congressman John K. Henrick, of Kentucky, possessed an accommodating nature. He was sitting in a courtroom one day, when a not overbright young attorney undertook to read a petition in a divorce suit, but soon got himself badly tangled up in a maze of legal phrases. The judge sought to straighten him out, but he was soon more deeply ensnared than ever. Again the judge interposed, and again the young lawyer fell into confusion.

Observing that the judge was about to boil over with rage, Henrick arose and said, "I hope, your Honor, that you will bear patiently with your young friend here. He is doing his best."

"I know that," replied the judge rather testily, "and I intend to bear with him patiently. I am merely trying to give him an idea."

"Don't do it," hastily interposed the Colonel. "He's got no place to put it."

The old colored couple had a letter from their boy in the Armed Service, and the father was reading it, and telling his wife what it said.

"Mose say he is o.k. but dat he cain't tell whar he is at," he said.

"Dass jes lak dat triffin' scoun'el," said Mandy, "I knowed he go an' get hisse'f lost."

A conference is a group of men who individually can do nothing, but as a group can meet and decide that nothing can be done.

A statistician is a man who draws a mathematically precise line from an unwarranted assumption to a foregone conclusion.

A professor is a man whose job it is to tell students how to solve the problems of life which he himself has tried to avoid by becoming a professor.

A consultant is a man who knows less about your business than you do and gets paid more for telling you how to run it than you could possibly make out of it even if you ran it right instead of the way he told you.

A specialist is a man who concentrates more and more on less and less.

An optimist thinks the future is uncertain.

A pessimist is afraid the optimist is right.

An economist is a man who can make a simple subject complex, a complex subject simple; in other words, an economist is simply simple.

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## BOOTS, BOOTS, BOOTS, BOOTS!

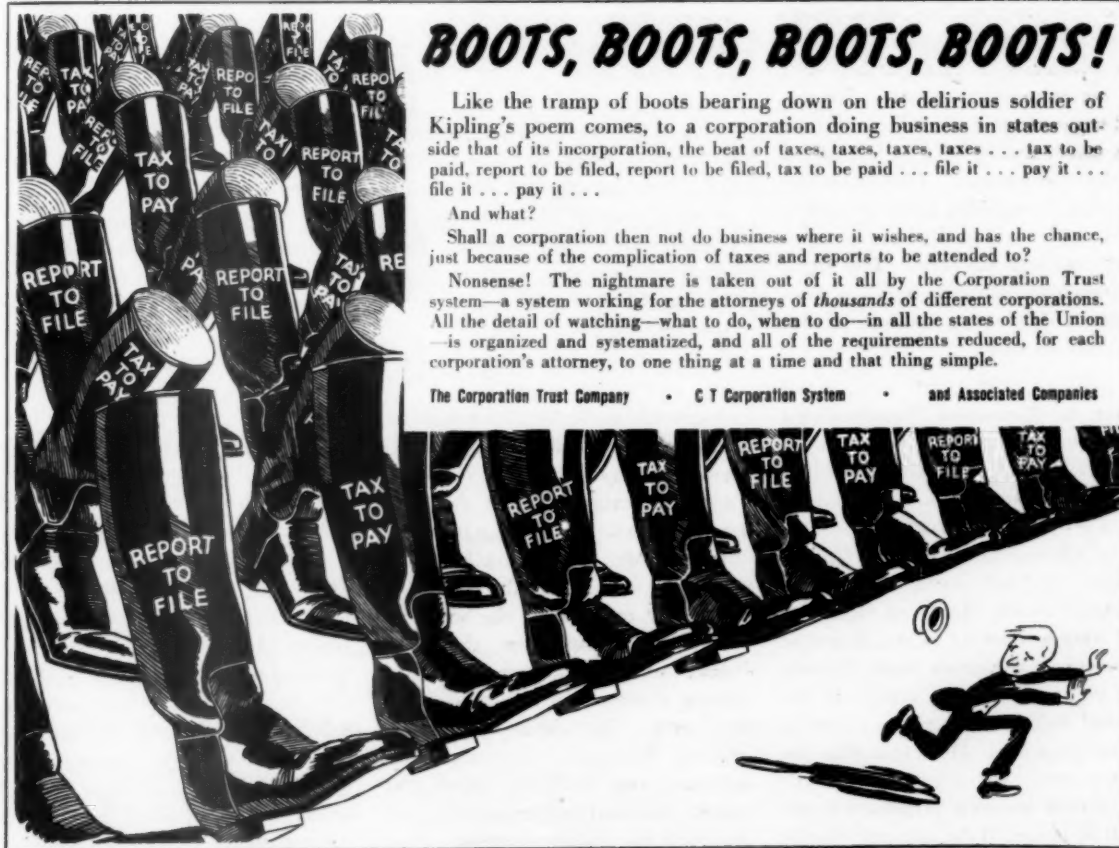
Like the tramp of boots bearing down on the delirious soldier of Kipling's poem comes, to a corporation doing business in states outside that of its incorporation, the beat of taxes, taxes, taxes . . . tax to be paid, report to be filed, report to be filed, tax to be paid . . . file it . . . pay it . . . file it . . . pay it . . .

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## IN THIS ISSUE

**Our Cover**—The portrait of General Edward S. Bragg, who commanded the "Iron Brigade" of Wisconsin in the war between the North and South, greets our readers from the cover of this issue. Our historian, George R. Farnum, interestingly portrays this eminent lawyer-soldier, not less distinguished at the Bar than in the field of battle. Portrait, courtesy of Wisconsin Historical Library.

**American Capacity for Self-Government**—Honorable Hatton W. Summers, chairman of the Committee on the Judiciary, House of Representatives, points out the perils of bureaucracy in an address delivered before the Second New England Conference, Boston.

**Administrative Procedure Bill**—An improved procedure for federal administrative agencies is embodied in a bill, prepared by the Association's Committee on Administrative Law, and published in this number with the recommendation that comments and suggestions of those interested in this important subject be submitted to the Committee. The proposed bill wisely excludes from its operations, and so from present controversy, all war agencies. The draft distinguishes sharply between procedural rule making and administrative adjudication.

**Power to Determine Constitutional Questions**—In an article entitled "Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions?" William G. McLaren, of the Seattle Bar, State Delegate to the House of Delegates and former member of the Board of Governors, examines and defends the right of a trial court of the United States to determine constitutional questions. He warns that the courts must not lose sight of the distinction between jurisdiction and judicial power, if the judiciary would

maintain its status as an independent branch of the government.

**Review of Recent Supreme Court Decisions**—In *U. S. v. Dotterweich*, Mr. Justice Frankfurter sustains a conviction for breach of a federal criminal statute, without conscious wrong. The rigors of the statute, which forbids the introduction of adulterated or misbranded products into interstate commerce, are softened by an immunity which may be obtained by procuring from the seller, before the article is introduced into interstate commerce, a guaranty that the product is not adulterated or misbranded.

In *Roberts v. U. S.*, an accused, who had been fined and sentenced

In *Colorado v. Kansas*, the Court held that it would exercise judicial caution in adjudicating relative rights of states in disputes as to restrictive rights in waters of a stream flowing from one state to another; that the dispute must be adjudicated on a basis of equality of rights so as to secure the benefits of irrigation without depriving the other of the benefits of a flowing stream.

In *Cafeteria Employees Union, etc., et al. v. Angelos, et al.*; *Same v. Tsakires*, a labor organization picketed a cafeteria and the state courts enjoined the picketing, on the ground that the cafeteria was conducted exclusively by its owners, who employed no help and because the pickets departed from the truth in stating that the owners of the business were unfair to labor. The Supreme Court reversed the decision of the state courts.

We are indebted to Charles T. Akre, of Washington, D. C., member of the Section of Taxation, for the reviews in this issue of two important tax cases.

In *Merchants National Bank v. Commissioner of Internal Revenue*, Mr. Justice Rutledge delivered the opinion of the Court, Justices Douglas and Jackson dissenting. It was held that a remainder bequest to charity is not deductible in determining the net estate under the circumstances shown by the record in that case and that for income tax purposes, profits from the sales of the estate's securities cannot be deducted as amounts held for the benefit of the charity remaindermen.

In *Commissioner v. Gooch*, Mr. Justice Murphy delivered the unanimous opinion of the Court, holding that in a proceeding to determine a deficiency in federal income taxes, the Board of Tax Appeals has no jurisdiction to determine and apply, by way of recoupment, a prior year's overpayment.

### ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at \$1 each of the topical index of the first 23 volumes.

to a term of two years' imprisonment, had then been paroled for a five-year period, was again taken into custody, his parole vacated and a new sentence of three years' imprisonment imposed. Mr. Justice Black, in the prevailing opinion of the Court, reversed the increase of the sentence. Mr. Justice Frankfurter, the Chief Justice and Mr. Justice Reed concurring, dissented on the ground that the statute, by clear implication, granted the power to increase the sentence and that otherwise construed it would be impotent to accomplish its evident purpose.

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No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

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# CURRENT EVENTS

## **Second Regional War Meeting Will Be Held in St. Louis**

**P**RESIDENT Joseph W. Henderson has announced that the American Bar Association's second regional war meeting will be held February 4 and 5 at the Jefferson Hotel, St. Louis, Missouri, for the benefit of its members in Missouri, Southern Illinois, Southern Indiana, Kentucky, Arkansas, Oklahoma and Iowa.

## **Lawyers' Volunteer Assistance To OPA Is Imperiled**

**T**HE statutory obstacle which the Committee on Civilian Defense and other agencies of the American Bar Association pointed out more than a year ago, in connection with the voluntary services of lawyers in aid of fair and competent performance of local functions of the OPA, has lately become a serious problem in many areas, and has led to numerous resignations from volunteer staffs in the New York region this month. It is reported that the national OPA has renewed its appeal to the Congress for the enactment of legislation which will halt the resignation of many of its most valuable volunteers in local units.

In view of the provisions of Section 203, Title 18, of the United States Code, these volunteer lawyers have become fearful that their unpaid assistance to the OPA puts them in a position where they are criminally liable, according to the letter of the ancient statute, if they or their firms practice for compensation before other governmental bureaus or departments or appear in matters in which the government has an interest.

Violation of this statute is a criminal offense punishable by imprisonment and fine as high as \$10,000, according to Henry N. Rapaport, Chief Rationing Attorney of the New York District OPA. The bill to protect OPA volunteer lawyers is understood to be pending before the House Committee on the Judiciary. Meanwhile, OPA functioning in the New York region is jeopardized by many resignations due only to the statutory restriction.

The New York District OPA comprises some seventy-two local rationing boards, set up in the twelve counties of the district, including the five boroughs of Greater New York. The usual rationing board is made up of three members, with as many for its price panel. The New York County War Price and Rationing Board has some 200 members and is divided into numerous panels. Some forty lawyers are reported to have resigned from the volunteer posts in which they have been serving without pay.

## **Navy Needs Officers for Specialized Programs**

**T**HE Navy needs commissioned officers to be assigned to general duties and also to duties of highly specialized nature and for which a record of successful training and experience in various fields of specialization is prerequisite. In general, applicants must pass a rigid physical examination; however, in connection with some of the programs, defects which are not organic in nature and which are not likely to interfere with the performance of the specified duties may be waived by the Navy Department. Applicants under thirty years of age who are physically fit for sea duty will not be considered for these programs.

Among those needed are men to act as industrial relations officers who are to be responsible for all industrial relations activities for civilian employees in Navy yards or stations, or to assist the officer in charge of these activities; men to be assigned to duty as representatives of the Navy in matters of interest concerning labor relations between civilian contractors of Navy material and their employers; and men to be assigned to duties in connection with the administration and enforcement of Public Law 149, approved July 14, 1943, concerning sales and services renegotiation.

Detailed information can be obtained from the Office of Naval Officer Procurement, 1320 G Street, N. W., Washington, D. C.

## **Board of Governors Acts on Patent Section Resolutions**

**T**HE Board of Governors has reported upon the resolutions of the Section of Patent, Trade-Mark and Copyright Law which were referred to it for action by the House of Delegates at the Annual Meeting in August. These resolutions involve approval or disapproval of certain pending or proposed legislation. The resolutions are set out in full at pages 594 to 598 of the October, 1943, AMERICAN BAR ASSOCIATION JOURNAL.

The following resolutions were approved by the Board: II, concerning amendment of R.S. 4915 (H.R. 1372); III, concerning social patents (H.R. 3006); VII, concerning compulsory licensing (S. 2303); IX, "Science Mobilization Bills" (S. 702, S. 607, H.R. 2100, H.R. 2285); X, concerning revision of interference prac-

## CURRENT EVENTS

tice; and XII, concerning trademarks.

Resolution VIII, also referred to the Board of Governors and concerned with H.R. 675, on the subject of compulsory licensing, was referred by the Board back to the Section for amplification of its views. With respect to Resolution XI, dealing with Federal Administrative Procedure, and disapproval of certain portions of H.R. 2323 and S. 323, the report of the Board states that "any subject involving federal administrative procedure should have the attention of the Committee on Administrative Law; and that there should be no action with respect to administrative procedure relating to the Patent Office which might be out of harmony with general legislation recommended on the subject of administrative procedure relating to all federal offices and agencies."

### A Lawyer-Soldier Meets Death in Action

**C**OLONEL John Gardiner Conroy, of Brooklyn, New York, was killed on Sunday, November 21, while organizing the attack after the landing on Makin Atoll, in the Northern Gilbert Islands. He was 54 years old and had been a member of the American Bar Association since 1930.

Colonel Conroy had a distinguished career as a soldier and had been active in his profession. After being graduated from Columbia Law School, he became a member of the New York National Guard, served on the Mexican border as a lieutenant in 1916 and 1917, became a captain in the 106th Infantry in overseas service in 1917, and took part in several notable battles in the last stages of World War I.

After serving on the Governor's military staff in New York from 1922 to 1930, he was made a lieutenant colonel and judge advocate of the Twenty-seventh Division, N.G.N.Y., in 1934. In April of 1939, he was

transferred from the judge advocate's work to full command of the 71st Infantry, and in August of 1940, to command of the 165th Infantry, formerly the famous "Fighting Sixty-ninth", made up largely of New York business and professional men. In that capacity, he entered the present war, and had been stationed in Hawaii, from which his unit went on the successful mission for which he gave his life.

Colonel Conroy had been President of the Lawyers Club of Brooklyn, as well as of many civic organizations, and had won respect by his work as a practising lawyer.

### Notice by the Board of Elections

**T**HE following jurisdictions will elect a State Delegate for a three-year term in 1944:

|                |                   |
|----------------|-------------------|
| Alabama        | North Dakota      |
| California     | Pennsylvania      |
| Florida        | Tennessee         |
| Hawaii         | Vermont           |
| Kansas         | Virginia          |
| Kentucky       | Wisconsin         |
| Massachusetts  | Territorial Group |
| Missouri       | (Alaska, Canal    |
| New Mexico     | Zone, and Phil-   |
| North Carolina | ippine Islands)   |

The States of Kansas and Kentucky will also elect Delegates to fill vacancies expiring at the adjournment of the 1944 Annual Meeting.

The following states will elect a State Delegate to fill vacancies for the balance of the term indicated:

|                |                     |
|----------------|---------------------|
| Delaware       | 1946 Annual Meeting |
| Montana        | 1945 Annual Meeting |
| South Carolina | 1945 Annual Meeting |

Nominating petitions for all State Delegates to be elected in 1944 must be filed with the Board of Elections not later than March 16, 1944. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be obtained from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be time-

ly, nominating petitions must actually be received at the Headquarters of the Association before the close of business at 5.00 P.M. on March 16, 1944.

Attention is called to Section 5, Article V, of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

#### Board of Elections

EDWARD T. FAIRCHILD, *Chairman*  
WILLIAM P. MACCRACKEN, JR.  
LAURENT K. VARNUM

# AMERICAN CAPACITY FOR SELF-GOVERNMENT IS BEING DESTROYED BY BUREAUCRACY

By HATTON W. SUMNERS

Chairman of the Committee on the Judiciary,  
House of Representatives

I AM deeply grateful for the privilege of addressing this gathering of people from the great states which constitute New England. Great is the history of these states; great, the achievement of their people. But we must be convinced that greater than they were, our states must be, and greater our people must be, if we are to preserve free government, and the time is now. That is why I am here. I want to talk to you about it, because you people are the government. The government is not in Washington.

A democracy is an association of private people engaged in the common venture of governing themselves—no king, no hereditary nobility—the people are the government.

In our system of government, the states constitute the habitat, and provide the only machinery through which our democracy can function in the discharge of general governmental duties. The federal organization was never intended to do that job. It cannot do it except as a bureaucracy. After the Revolution, the people wanted one Army, one Navy, one diplomatic corps, one system of coinage, weights and measures, free commerce among themselves, and a relatively small number of other things. So they created the present federal organization to be their agent, to do for them these few things which these states could not so well do themselves, the states reserving to themselves and their people general governmental duties and powers.

## Bureaucracy Reduces States to Vassals

More and more in later years we have been engaged in the perfectly silly undertaking of trying to make this federal organization function as the general governmental agency of all the peoples. As a result, we have built up at Washington a governmental colossus, a monstrosity utterly beyond human comprehension or democratic control, regardless of which party or group of officials is in power. By the nature of that sort of government, it is inevitable there shall be extravagance, waste-fulness, tyranny. It is inevitable that there shall be more and more government by directives, issued by appointed, not elected, personnel working without supervision.

An address delivered before the Second New England Conference, a semi-official gathering of representatives of the people and organizations of the New England States, at Boston, Massachusetts, on November 19, 1943.

We have all but reduced the states to the status of governmental vassals. We have gone further and largely dissolved the states by attaching their subdivisions directly to the federal Treasury through loans and grants. We have made the individual citizens and the businesses in these states directly subject to federal control by the creation of their financial dependence upon the federal Treasury. Money which we thought we were getting for nothing we realize now was got by mortgaging the tax-paying power of unborn generations, while at the same time that tax-paying power was also mortgaged to get money to pay the salaries and expenses of the vast army of administrators, directors, and bosses of the people.

## States Must Regain Control of Their Sources of Revenue

Let us not deceive ourselves. We are now in the initial stages of what will prove to be another of the great battles between concentrated power and democratic government. In this struggle the states must lead. They must regain control over their sources of revenue which the federal government has tapped and is using to subjugate the states and their subdivisions by loans and grants from the federal Treasury. They must reassert and reestablish their sovereignty as responsible agents of general government. They must do this, not only in order to preserve democratic control in matters of general government, but in order that the governmental business of the federal organization, freed of the business which belongs to the states, can properly take care of the federal business. That would bring the total of its business within the comprehension of the elected representatives, so that federal laws may be enacted by the federal Congress instead of being enacted as "directives" by an appointed bureaucratic personnel.

Whoever controls the purse string, controls. No constitutional limitation is effective against that power. It is without limit. We must right about face. We are not only weakening the states, but we are destroying the self-reliance, the courage, the stamina, and the governmental capacity of their people—the most deadly thing that can be done to a democracy. We are doing what the declared enemies of our democracy could not do

## AMERICAN CAPACITY FOR SELF-GOVERNMENT

to the structure of our government and to the governmental capacity of the people, upon whose capacity to govern our democracy absolutely depends.

### **Control of Revenues Is Used to Centralize Bureaucratic Power**

It is axiomatic in our system of government—and I think it is axiomatic everywhere—that he who controls the purse string, controls. This was demonstrated when the House of Commons got hold of the purse string in England. It took a long time, but now the Commons are supreme because they never turned loose the purse string.

We are making a similar demonstration in this country, that whoever controls the purse string, controls; except that it is operating in exactly the opposite direction. The Commons used that control to decentralize power, move it back towards the people. We are using it to centralize power, move it away from the people. They used it to strengthen democracy; we are using it to weaken democracy and strengthen bureaucracy. Of course, the federal organization is important in the field of its responsibility. That is not what we are now considering. It is the neglect and destruction of our states which we are considering.

In our schools, on patriotic occasions, and in programs of bar associations where our Constitution is discussed, rarely are the states mentioned. In the prayers of ministers, they usually mention the President. They even name the Congress sometimes; but if God is to pay any attention to the states and their officials, He has to do it on His own.

### **Federal Agencies Are Over-Emphasized in Our Present Structure of Government**

For too long a time we have overemphasized the federal organization in our scheme of government. In fact, we have been suffering from a bad attack of "Federalitis." And yet, it is an historically established fact, and in harmony with reason, that after the formative period of a democratic nation there can be no progress in that system except in that direction which moves the power and necessity to govern away from the center, where it concentrated during the formative period, back toward the people into the units of government which they can control.

Fortunately for us, we have the states, which are not too large for democratic control. They function in the main through smaller units of government. Their chief officers are chosen by the people. They afford the opportunity and provide the machinery for the operation and development of democratic institutions, and the development of the governmental capacity of the people, who are the governors in a democracy.

### **No Development of Bureaucratic Government Has Been a Gain for Liberty or Law**

All commentators, in so far as I know, agree that the Habeas Corpus Act, the Magna Charta, the Petition of Rights, and our own Declaration of Independence,

mark great epochs in democratic governmental history, because their effect was to decentralize governmental power and move it back toward the people. On the other hand, no great monument can be found along the road which democracy has traveled marking a place where governmental power and responsibility have been moved away from the people, out of the units of government which they can control, toward a central governmental agency. Such a direction of movement is not progress in a democracy.

No period of concentration of governmental power, of bureaucratic development, of government by edict instead of government by laws, will ever be cited by the historians of the future as a time of democratic progress. Except by conquest, no people privileged to govern themselves ever lost that privilege until they had first lost their capacity for self-government.

### **Capacity for Self-Government Is Lost by Non-Use**

Capacity for the independent exercise of the functions of self-government is lost by its non-use. There must be capacity, and a governmental power must be lodged in a governmental agency which the people can operate. No people who failed to use their capacity for self-government were able to retain it. No people who had lost their capacity to govern themselves were ever able to remain free. People learn to govern by governing. They retain the ability to govern by using it. They lose the ability to govern by not using it. They acquire the greater ability to meet the greater problems of tomorrow only by using today the ability possessed to meet the problems of today.

### **Democracy Is Imperiled by Present Trends**

By disregarding these fundamental laws of nature we imperil our democracy. It is the plan of Nature, of God the Big Boss, whether we like it or not. It will be difficult to do this job. Only a great people can do it. It will test the stamina, the patriotism, and the purpose, of the people.

The difficulties of popular government, like all other difficulties, have been provided for the development of people. Nature has no disposition to avoid difficulties for people. It creates them. The development of people is the central objective of nature. Difficulties are the gymnastic paraphernalia provided for that development. We know by our own experience and observation that no individual was ever greater than his difficulties. No victory was ever greater than the battle fought to win it.

The greatest epochs of the world are those in which peoples with a purpose which would not yield, with a courage which sustained them, fought their way through the greatest difficulties of time.

### **Human History Consists of Overcoming Difficulties**

The history of the world is but a record of difficulties overcome. Being on top of the hill is not important

## AMERICAN CAPACITY FOR SELF-GOVERNMENT

in the scheme of nature. Had it been so, we would all have been created on the top of the hill. Climbing the hill and gaining the strength from the climbing is what is important, instead of sitting down at the foot of the hill because it is steep and rugged and letting the muscles grow flabby. It is a law, a universal law. The law of the Big Boss. Therein lies the philosophy of self-government. It is the plan of God. He has not put in the hearts of people the yearning to be free and self-governing, and then made the realization of that yearning to depend upon the will and the good disposition of one man or a few men in power. They might be ambitious to be known as great governors of a people instead of useful servants of a great people, the only aspiration a public servant in a democracy has any right to have.

### Government Cannot Do the Job for Free Men

Men are not wise enough to guide by their theories the policies of a great democracy. We cannot do this job if we approach it as Democrats and Republicans. We can do it only as patriotic American citizens, determined that this shall remain one place where people have a chance to be free. Then we can do it.

Progress is slow. Progress is uphill. Progress is difficult. Progress is the road of struggle, but it is the road of strength. Along that road lies the thrill of victory, the fitness to live.

We have been getting mighty soft in America. We have wanted the easy way, the fast way. We have turned to Uncle Sam. When some difficulties have come to our communities, to the smaller units of government, to our states, to challenge us to effort and to reward us with strength for the duties of tomorrow, we have refused the challenge. We have turned our backs upon the opportunity, and have cried out for a supergovernment to come in and do the job for us.

As a result we not only fail to receive the increased capacity to govern which nature gives as a reward to those who use the capacity already possessed, but we lose capacity. Nature takes from us the capacity which we fail to use. It is the law of life.

Let the greatest athlete go to bed and cease to use his muscles; the strength in his muscles will not remain. Let any self-governing people shift their governmental responsibilities away from themselves, and in proportion, as they do, the strength to govern departs. When a people yield to a great centralized government to think and plan and care for them from the cradle to the grave, it is not far to the grave for everything which free men hold dear.

Basically considered, from the disregard of these fundamental facts, great laws of Nature which govern not only in government, but everywhere, which determine sound policy, which limit human discretion, which fix the program for the development and preservation of governmental capacity of the people—from that dis-

regard, basically considered, our major governmental difficulties and dangers have come.

### America Needs to Get Away From Theories

I am not a theorist. I have examined the facts. I have been trained in the school of practical experience. What little sense I have is of the usable sort, I think. I have subjected the judgment just expressed to every test to which experience has taught me to subject judgment before yielding to its guidance. Only in the field of government are people so foolish as to follow the theories of men, accredit men with infallibility, an attribute which belongs only to God.

Our scientific schools, practical schools, schools of medicine, engineering, all of them, are discovering natural laws and training men how to work in harmony with them. Not so in government. It is the one exception.

In a time of great progress in every other field of human effort, government stands alone as the colossal failure of the age. Serious, unemotional people are questioning now whether the children of today will be able to live under a free government, under a democracy, or will live under some form of non-democratic government. We cannot do to our democracy that which under the operation of the laws of cause and effect is destructive of democracy, and expect ours to survive. Governments are not accidents. They have been provided for in the great economy, and are themselves governed by natural law.

### The Long Struggle for Law-Governed Freedom

We did not write, in a creative sense, our federal Constitution. Every basic provision of our federal Constitution had already been incorporated in those of states before the Federal Convention met. The Royal Charters preceded them. That of the little colony of Rhode Island, one of the greatest state papers of all time, was granted in 1663, I believe. Each of the basic provisions of our Constitution had originated out of necessity, and had been tested through centuries by a people peculiarly gifted with the genius of self-government, long before any constitutional conventions undertook the task of written constitutional constructions.

We must rid our minds of the silly, historically incorrect, humanly impossible mythological tales about some supermen having created for us our Constitution and our system of government. Instead of such tales, which have crowded out the truth, which are as impossible of human accomplishment as the tales of the Grecian gods, we must know the truth about our Constitution. It came from the same source a tree comes from. It is governed, as is the tree, by natural laws which require a people capable of governing and an available governmental machine which they can operate.

(Continued on page 48)

# FAIR ADMINISTRATIVE PROCEDURE FOR FEDERAL AGENCIES IS OFFERED IN IMPROVED DRAFT OF A PROPOSED BILL

AS a specific step toward legislation for remedying abuses in the procedures of administrative agencies, the Association's Committee on Administrative Law has prepared and issued for study and consideration its revised drafts of a proposed "Administrative Procedure Act," as was unanimously authorized by the House of Delegates on August 26 (A.B.A.J., October 1943, pages 591-2). The text of the draft is published in full in this issue of the JOURNAL, and the comments and suggestions of those interested in the subject are invited by the Committee.

A first draft of the Committee's material for such a bill "to prescribe fair administrative procedure" for federal agencies was presented to the House of Delegates at the 1943 Annual Meeting, by Carl McFarland, former Assistant Attorney General, who had served on The Attorney General's Committee on Administrative Procedure. Under the sanction of the House, the draft was then submitted, for criticisms and suggestions, to the various Sections and Committees which have to do with one or more aspects of administrative law and procedure. With the aid of the suggestions thus received, the Committee has made an improved draft of the proposed Act, which is now offered for examination by lawyers and others. Meanwhile, public discussion of the subject is proceeding vigorously, in many parts of the country.

The members of the Association's Committee on Administrative Law for 1943-44 are Sylvester C. Smith, Jr., of New Jersey, chairman; William Clarke Mason, of Pennsylvania; Dean Roscoe Pound, of Massachusetts; Ralph M. Hoyt, of Wisconsin; Carl McFarland, of Washington, D. C.; Richard Joyce Smith, of New York; Felix T. Smith, of California; Julius C. Smith, of North Carolina; and Robert H. O'Brien, of Pennsylvania.

Members of the Association will recall that the first substantial recommendation of their Special Committee on Administrative Law was the presentation of a measure for the establishment of a Federal Administrative Court (see S. 1835, 73d Cong., 1st Sess.; S. 3676, 75th Cong., 3d Sess.; 58 A.B.A. Rep. 203, 426 [1933]; 59 A.B.A. Rep. 539 [1934]; 60 A.B.A. Rep. 136 [1935]; 61 A.B.A. Rep. 220, 233, 721 [1936]). This was succeeded by the legislative proposal known generally as the Walter-Logan Bill, passed by the Congress but vetoed by The President (62 A.B.A. Rep. 262, 790 [1937]; 62 A.B.A. Rep. 156, 333 [1937]; 63 A.B.A. Rep. 281 [1938]; 65 A.B.A. Rep. 215 [1940]; H.R. 6324, 76th Cong., 3d Sess.; House Doc. No. 986, 76th Cong., 3d Sess.; 66 A.B.A. Rep. 143-144 [1942]).

Shortly thereafter the Committee on Administrative Procedure—appointed at the direction of The President of the United States and popularly known and referred to as The Attorney General's Committee on Administrative Procedure—concluded its two-year study and made its final report, including legislative recommendations by both a majority and a minority (Sen. Doc. No. 8, 77th Cong., 1st Sess., 1941).

The American Bar Association did not adopt either of those proposals as its choice, nor did it formally continue its backing of the Walter-Logan Bill. Instead, it adopted a declaration of principles which it felt should be included in any adequate federal legislation, and declared that, of the existing proposals, those of the minority of The Attorney General's Committee more nearly met the principles so declared. Thereafter a subcommittee of the Senate Judiciary Committee held extensive hearings on the proposals growing out of the report of The Attorney General's Committee (Hearings, *Administrative Procedure*, on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess., three parts plus appendix), but suspended consideration in the summer of 1941 in view of the imminence of war and the then declared national emergency.

During the next two years the Association's Committee on Administrative Law devoted its energies to the development of the Conference on Administrative Law and other matters covered in its annual reports (67 A.B.A. Rep. 226 [1942]). The whole situation was reviewed by the Committee in its report for 1943. By a supplemental report submitted in August of 1943, the Committee noted numerous indications of renewed public and Congressional interest in the subject of administrative procedure, submitted a tentative draft of material for federal legislation on the subject, and urged the perfecting of a comprehensive proposal, in order to (1) provide detailed proposals upon which attention could be focused, (2) serve as model provisions for reference, and (3) furnish a draft for consideration in the adoption of a general administrative procedure statute (A. B. A. J., October 1943, pages 591-2). This course of action was heartily approved by the House of Delegates.

The draft now perfected by the Committee and published in this issue is a revision of the draft submitted to the House of Delegates last August. It differs from that draft both in detail and in parts of its fundamental operation and coverage. The changes so made have resulted from a great volume of comments received from

## ADMINISTRATIVE PROCEDURE ACT

Committees and Sections of the Association, from state associations and committees, and from experienced practitioners, as well as further studies and conclusions on the part of the Committee.

The revised Draft is stated by the Committee to be designed primarily to secure publicity of administrative law and procedure, to require that administrative hearings and decisions shall be conducted in such a manner as to preclude the secret reception of evidence or argument, to restate but not expand the right of (and procedures for) judicial review, and to foster the foregoing by requiring an intra-agency segregation of deciding and prosecuting functions and functionaries. No attempt is made to require administrative hearings where Congress has not done so. Although agencies are confined to the scope of their authority, no attempt is made to limit existing administrative authority. A more detailed explanation of the several provisions is to be found in the comments accompanying the several sections and subsections of the revised draft.

In order to preclude the possibility that essential guarantees of the administrative process might be held to be impliedly repealed, the Committee's proposal is drawn in a form to restate the main outline of adminis-

trative procedure. It excludes from its operation, and so from present controversy, all war agencies, as to some of which the legislation for their continuance will come before the Congress to convene this month, thereby enabling the consideration of appropriate corrective measures in connection with the particular bills. The draft distinguishes sharply between rule-making and administrative adjudication; but, as stated above, its hearing and decision requirements are not imposed where Congress has not required an administrative hearing. In fact, even where Congress has required a hearing, the proposal does not apply if there is a subsequent right to a judicial trial *de novo*. It does not supersede or revise the judicial review accorded by legislative courts such as the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, or the Court of Claims.

The accompanying Draft No. 2 contains, after each provision, a brief comment as to its applicability, purpose, or source. In order to reduce the length of comments, most of the references are to the exhaustive studies and final report of The Attorney General's Committee.

### A BILL

#### To Prescribe Fair Administrative Procedure, and for Other Purposes

**B**E it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into sections and subsections according to the following table of contents, may be cited as the "Administrative Procedure Act."

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### ADMINISTRATIVE PROCEDURE ACT

SEC. 1. DEFINITIONS.—Except as otherwise expressly stated or required by the context of this Act—

(a) **Agency.**—"Agency" means each office, board, commission, independent establishment, authority, cor-

poration, department, bureau, division, institution, service, administration, or other unit of the Federal Government other than Congress, the courts, or the governments of the territories or the District of Columbia, and means the highest or ultimate authority therein: *Provided, however,* that, except as to the requirements of section 2, there shall be excluded from the operation of this Act all agencies and functions which expire on or before the conclusion of the six-month period following the termination of the present war.

*Comment.*—The term "agency" is defined substantially as in the Federal Reports Act of 1942 (Public No. 831, 77th Cong., 2d Sess., December 24, 1942), the Federal Register Act (Sec. 4, 49 Stat. 500, 44 U.S.C. 304), and the Federal Register Regulations (1 C.F.R. 2.1 (b), as revised by 6 F.R. 4397).

The exemption of war agencies and functions is deemed necessary for obvious reasons. Furthermore, since it would take at least a year for any adequate proposal to be placed in operation (see section 10 of draft, *infra*), probably no substantial gain would be made in any event by the attempt to apply the proposal to war agencies. There seems to be no reason, however, why war agencies and procedures should not be required to publish the materials required by section 2, since the simple publication of the procedure and policies of war agencies or functions would undoubtedly aid in the prosecution of the war by informing the public.

It should be noted that the definition of agencies does not mean that all acts of such agencies are subject to the procedural requirements of the draft. The definition of agency is merely a preliminary device for inclusion and exclusion. If an agency is subject to the proposal, never-

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theless it is subject thereto only to the extent that acts, rules, or orders are defined and not further excluded in the following sections, subsections, and provisos.

(b) **Rule making.**—"Rule making" means the administrative procedure for the formulation of, and "rule" means the written statement of, any regulation, standard, policy, interpretation, procedure, requirement, or other writing issued or utilized by any agency, of general applicability or legal effect and designed to implement, interpret, or state the law or policy administered by, or the organization and procedure of, any agency.

*Comment.*—The definition of rule making and rule follow essentially the definitions of the Federal Register Act (Secs. 5 (a) and 11 (a), 49 Stat. 500, 44 U.S.C. 305 (a) and 311 (a)), in which the essential language is "general applicability and legal effect." The reason for the sharp distinction between rule making and adjudication (see section 1 (c)) is that they are the two main types of administrative justice (see the *Final Report*, Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess., 1941, pp. 1-2, 5, and chs. IV, V, and VI, hereinafter referred to as "*Final Report*, Attorney General's Committee" with page references). At the same time, their procedure differs in essential respects, notably the requirement of a hearing as to the facts.

(c) **Adjudication.**—"Adjudication" means the administrative procedure of any agency, and "order" means its final disposition or judgment (whether or not affirmative, negative, or declaratory in form), in connection with a particular case other than rule making and without distinction between licensing and other forms of administrative action or authority.

*Comment.*—"Adjudication" has not been defined generally in statutes, except by implication or reference to particular subjects and orders. However, since there are only two basic types of administrative justice—rule making and adjudication—the words "other than rule making" serve to emphasize the essential distinction.

**SEC. 2. PUBLIC INFORMATION.**—Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

*Comment.*—The following provisions requiring publicity of administrative rules and orders are designed to effectuate the unanimously agreed conclusion of the Attorney General's Committee to the effect that "an important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure." in which connection the Committee also pointed out that the *Federal Register* and *Code of Federal Regulations* statutes "did not provide affirmatively for the making of needed types of rules or for the issuance of other forms of information. . . . A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information" (*Final Report*, pp. 25-26, and see also pp. 123-124).

(a) **Rules.**—Every agency shall separately state and currently publish rules containing (1) descriptions of its internal and field organization together with the

general course and method by which each type of matter directly affecting private parties is channeled and determined, (2) substantive regulations authorized by law, as well as any statements of general policy or interpretations framed by the agency and of general public application or legal effect, and (3) the nature and requirements of all formal or informal procedures available to private parties, including forms and instructions as to the scope and contents of all papers, reports, or examinations.

*Comment.*—The Final Report of the Attorney General's Committee lists at pages 26-28 the foregoing as the types of rules which "agencies should be authorized and directed to make and issue . . . as . . . appropriate to the agency's functions"; and the Committee also emphasized that the three types of information should be separately stated and their publication kept current. The Special Committee on Administrative Law of the American Bar Association has recently pointed out the continued and even greater present need for such publication (68 A.B.A. Rep.—), and the Administrative Law Committee of the Federal Bar Association has also emphasized the need.

The foregoing provision, however, does not require the making of substantive or interpretative rules or statements of policy. As desirable as such a mandatory requirement undoubtedly is, in view of the difficulty of foreseeing all contingencies and of framing any provision which would take account of the varying time required for the formulation of different substantive (and interpretative or policy stating) rules it is felt that only the publication of agency organization and procedures should be made mandatory. But, to the extent that rules of substance, policy, or interpretation are framed by any agency, publication should be required.

(b) **Rulings and orders.**—Every agency shall preserve and publish or make available to public inspection all rulings on questions of law and all opinions rendered or orders issued in the course of adjudication, except those relating to the internal management of the agency and not directly affecting the rights of, or procedures available to, the public.

*Comment.*—Since rulings and orders made in the course of adjudication of particular cases are one of the principal sources of administrative law, it is obviously necessary that they be either published or made available to public inspection. The essential nature and value of this type of material was emphasized by the Attorney General's Committee at pages 29-30 of its Final Report.

(c) **Releases.**—Except to the extent that their contents are included in the materials issued or made available pursuant to subsections (a) and (b) of this section, every agency shall, either prior to or upon issuance, file with (or, in the case of any agency not located at the national capital, register and mail to) the Division of the Federal Register all other releases intended for general public information or of general application or effect; and the Division shall preserve and make all such filings available to public inspection in the same manner as documents published in the Federal Register: *Provided, moreover*, that no agency shall, directly or indirectly, issue publicity reflecting adversely

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upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction: *And provided, further*, that, upon proper request, matters of official record shall be made available to all interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

*Comment.*—Agency releases, particularly "processed" statements, are an important source of administrative information. "The mimeograph has superseded the Federal Register, and the Office of War Information has attempted to limit both the output of processed information and the maintenance of mailing lists" (*Report*, Special Committee on Administrative Law, American Bar Association, 1943, 68 A.B.A. Rep.—). Since this information is an important source of administrative policy, the requirement of a central depository where such releases may be subject to public inspection is both simple and necessary. The provision makes complete a system for the publication of administrative information inaugurated by the Federal Register Act.

The provisos limiting agency publicity and authorizing the issuance of other information embody simple requirements of obvious merit and utility. The prohibition of injurious publicity apart from formal procedures and orders will withdraw official privilege to issue harmful statements. The recognition that other matters of official record shall be made available to interested persons will ease the tasks of innumerable private persons and organizations.

**SEC. 3. RULE MAKING.**—Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

*Comment.*—The introductory exception to this section, which is slightly broader than the exception to section 2, is designed to relieve military, naval, and diplomatic agencies from the simple requirements of the following subsections. Very few rules are issued by such agencies and, if issued, are subject to the requirements of publication contained in section 2, unless of a type "requiring secrecy in the public interest."

(a) **Notice.**—Except in cases in which the agency is authorized by law to issue rules without a hearing and notice is impracticable because of unavoidable lack of time or other emergency, every agency shall publish general notice of proposed rule making including (1) a statement of the time, place, and nature of any public rule making procedures, (2) reference to the authority under which the rule is proposed, and (3) a description of the subjects and issues involved: *Provided, however*, that this subsection shall apply only to substantive rules, and shall not be mandatory as to interpretative rules, general statements of policy, or rules of agency organization or administrative procedure.

*Comment.*—Public rule making procedures "are likely to be diffused and of a little real value either to the participating parties or to the agency, unless their subject-matter is indicated in advance. . . . In principle, therefore, each agency should be obliged to announce with the greatest

possible definiteness the matters to be discussed in rule making proceedings" (*Final Report*, Attorney General's Committee, p. 108). The subsection defines the places in which notice must be published, and lists the types of information to be contained therein. The contents of notice so specified are those usually included in notices. The definition is significant, because upon the definition depends the requirement of procedures contained in subsection (b) which follows. The main clause might have referred to "substantive" rules, since judicial decisions clearly distinguish them from other types; but, in order to make the situation perfectly clear, the proviso specifically excludes other types of rules. The reason for the exclusion of rules of organization, procedure, interpretation, and policy is three-fold: First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) below affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

(b) **Procedures.**—In all cases in which notice of rule making is required pursuant to subsection (a) of this section, the agency shall afford interested parties an adequate opportunity, reflected in its published rules of procedure, to participate in the formulation of the proposed rule or rules through (1) submission of written data or views, (2) attendance at conferences or consultations, or (3) presentation of facts or argument at informal hearings: *Provided, however*, that, in place of the foregoing, in all cases in which rules are required by statute to be issued only after a hearing the formal hearing and decision requirements of sections 6 and 7 shall apply: *Provided, moreover*, that, in all such procedures other than hearings required to be conducted in conformity with section 6, parties unable to be present shall be entitled as of right to submit written data or arguments, all relevant matter presented shall be recorded or summarized and given full consideration by the agency, and the reasons as well as findings and conclusions of the agency as to all relevant issues shall be published upon the issuance or rejection of the rules or proposals involved. Agencies are authorized to adopt procedures in addition to those required by this section, including the promulgation of rules sufficiently in advance of their effective date to permit the submission of criticisms or data by interested parties and consideration and revision or suspension of the rules by the agency; and nothing in this section shall be held to limit or repeal additional requirements imposed by law.

*Comment.*—This subsection applies only to the type of rules for which notice is required by subsection (a) above—that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of

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which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of sections 6 and 7 necessarily are to apply. Thus, the provision does not extend present requirements except to require agencies in the issuance of substantive rules, to permit at least the submission of written views or suggestions. This minimum requirement is based upon the premise stated as follows by the Attorney General's Committee (*Final Report*, pp. 101-103): "An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rule making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings." It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by statute required that rules be issued upon hearing.

(c) **Petitions.**—Every agency authorized to issue rules shall accord any interested person the right to petition for the issuance, amendment, or rescission of any rule in conformity with adequate published procedures for the submission and prompt consideration and disposition of such requests.

*Comment.*—Few agencies have regular procedures whereby private parties may secure a reconsideration of rules issued, or request the making of rules or amendments thereto. Both the majority and minority of the Attorney General's Committee proposed that such a provision be included in legislation (*Final Report*, pp. 195, 230) and no objections were made thereto during the Senate hearings on the proposals (*Hearings, Administrative Procedure*, on S. 674, S. 675, and S. 918, Subcommittee of Senate Judiciary Committee, 1941, 77th Cong., 1st Sess., p. 1386).

SEC. 4. ADJUDICATION.—In every case of administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing (except to the extent that there is directly involved any matter subject to a subsequent trial of the law and the facts *de novo* in any court) —

*Comment.*—The foregoing introductory double exception to the section on adjudication removes from the operation of sections 4, 6, and 7 all administrative procedures in which Congress has not required rules or orders to be made upon a hearing, and all matters subject to a subsequent trial *de novo* in any court. Section 6, respecting administrative hearings, applies only where there is a "requirement of a hearing"; and section 7, on decisions, applies only in "cases in which an administrative hearing is required to be conducted in conformity with section 6". It should be noted that section 3 also applies sections 6 and 7 to rule making in cases in which Congress has by statute required rules to be made upon hearing.

Of the two introductory exceptions to section 4, that limiting the application of the sections to those cases in which statutes require a hearing is the more significant, be-

cause thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has intentionally or traditionally refrained from requiring an administrative hearing. The second exception rules out such matters as the tax functions of the Bureau of Internal Revenue (which are triable *de novo* in the Tax Court) the administration of the customs laws (triable *de novo* in the customs courts), the work of the Patent Office (since judicial proceedings may be brought to try out the right to a patent), and subjects which might lead to claims determinable subsequently in the Court of Claims. The second exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement.

There should be no disposition to force the holding of administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications (but not rule making) in which statutes do not require an administrative hearing. There is no great reason for the application of the proposal to administrative hearings as to subjects triable *de novo* in the courts, moreover, because in those instances—although the administrative procedure may in some instances shift the burden of proof—the parties have a right to ultimate full judicial process.

(a) **Notice.**—Every agency undertaking the adjudication of any case shall give due and adequate notice in writing specifying (1) the time, place, and nature of relevant administrative proceedings, (2) the precise legal authority and jurisdiction under which the proposed proceeding is to be had, and (3) the matters of fact and law in issue: *Provided, moreover*, that the statement of issues of fact in the words of the statutes under which the agency is proceeding shall not be compliance with this requirement: *And provided, further*, that notices of the denial of all applications, petitions, or other requests of private parties, in whole or in part, shall specify both the reasons and grounds for such denial and any further administrative procedures available to such parties.

*Comment.*—Since section 4, and thereby sections 6 and 7 relating to hearings and decisions, apply only where statutes require a hearing, notice of hearing is an obvious and indispensable requisite. The only purpose of the subsection is to require adequate notice because "a . . . prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject-matter and issues involved. Notice . . . must fairly indicate what the respondent is to meet . . . Room remains for considerable improvement in the notice practices of many agencies" (*Final Report*, Attorney General's Committee, p. 63). The first proviso is deemed essential because, while Congress may validly confer administrative authority to agencies in the broadest possible terms, it is manifestly unfair to couch notices in specific cases in those same general words which are meant to cover a whole field of regulation—for, when notices are so written, they convey no more than that a party is summoned to answer under a designated law or jurisdictional statute without indication as to what it is that the agency feels contravenes the statutory provision. The second proviso is designed to assure necessary procedural information to par-

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ties or counsel who do not have available administrative law libraries from which to determine further administrative rights or remedies.

(b) **Procedure.**—In every case in which notice is required pursuant to subsection (a) of this section or otherwise, the agency shall afford all interested parties the right and benefit of fair procedure for the settlement or adjudication of all relevant issues through (1) an adequate opportunity for the informal submission and full consideration of facts, claims, argument, offers of settlement, or proposals of adjustment and (2) thereafter, to the extent that the parties are unable to so determine any controversy by consent, formal hearing and decision in conformity with sections 6 and 7: *Provided, however*, that, in cases in which determinations rest upon physical inspections or tests, opportunity for fair and adequate retest or reinspection by superior officers shall be provided, and thereafter hearing and decision in compliance with sections 6 and 7 shall be made available to the parties: *And provided, further*, that, in all instances in which statutes authorize and unavoidable limitations of time or other substantial factors are found to require summary action (whether of an emergency character or whether preliminary, intermediate, or final, and including the issuance of stop orders or their equivalents), no action so taken shall be lawful unless procedure for informal conference with the agency shall first have been made available, or with responsible officers thereof in the first instance followed by similar review procedure by the agency itself for the prompt adjustment or other fair disposition by consent of all relevant issues of law or fact; and no summary action so taken shall be lawful unless promptly and within a reasonable time thereafter the parties shall have been afforded an adequate opportunity for hearing, reconsideration, and decision in accordance with sections 6 and 7.

*Comment.*—This subsection is designed to do no more than require agencies to recognize that, even where formal hearing and decision procedures are available to parties, they and the parties are authorized to undertake the informal settlement of cases in whole or part before undertaking the more formal hearing procedure. Some agencies either neglect or preclude informal procedures, although now even courts through pre-trial proceedings dispose of much of their business in that fashion. There is even more reason to do so in the administrative process, for "informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process" (*Final Report*, Attorney General's Committee, p. 35). The statutory recognition of such informal methods, and their application to inspections and summary proceedings in which formal procedures are often impracticable, will both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

(c) **Declaratory rulings.**—Upon the petition of any proper party and in conformity with this section, every agency shall make and issue declaratory rulings to terminate a controversy or to remove uncertainty as to

the validity or application of any administrative authority, rule, or order with the same effect and subject to the same judicial review as in the case of other rules or orders of the agency.

*Comment.*—Courts, particularly state courts, have long recognized the validity of declaratory judgment procedures; but the administrative process has been slow to adopt such procedures. The Attorney General's Committee strongly recommended that the declaratory ruling be made a part of the administrative process and subject to judicial review (*Final Report*, pp. 6, 30-33). The only controversy is whether or not the giving of such rulings should be discretionary with the agency involved, on the ground that otherwise agencies would be required to make rulings where the facts are not established and thus be forced to operate "in vacuo." The answer is that, just as courts do in connection with judicial declaratory judgment applications, administrative agencies may properly refuse to render a declaratory ruling where the facts are not established. To leave the issuance of declaratory rulings to the discretion of agencies would simply result in a refusal to give such rulings either because the agency feels it more convenient not to do so or because the agency does not favor the necessary result. The purpose of declaratory judgments and declaratory rulings is to provide a method whereby private parties, when threatened with a definite situation such as the application of a rule or statute, may secure a declaration of rights and thereby settle the matter prior to incurring criminal or other penalties—a result devoutly to be fostered for the benefit of the public, the parties, and the administrative process.

SEC. 5. **ANCILLARY MATTERS.**—In connection with any administrative rule making, adjudication, investigative, or other proceeding or authority—

*Comment.*—The following provisions are designed to recognize and provide the basic rule for the several types of matters which may be ancillary or subsidiary to rule making, adjudication, or other administrative powers and proceedings. They are largely self explanatory and of obvious application.

(a) **Appearance.**—Except as otherwise provided by sections 6 and 7, every agency shall accord every person subject to administrative authority and every party or intervenor (including individuals, partnerships, corporations, associations, or public or private agencies or organizations of any character) in any administrative proceeding or in connection with any administrative authority the right at all reasonable times to appear in person or by counsel before it and its officers or employees, and shall afford such parties so appearing every reasonable opportunity and facility for negotiation, information, adjustment, or formal or informal determination of any issue, request, or controversy: *Provided, moreover*, that every person personally appearing or summoned in any administrative proceeding shall be freely accorded the right to be accompanied and advised by counsel: *Provided, further*, that every person subject to administrative authority or party to any administrative proceeding shall be entitled to a prompt determination of any matter within the jurisdiction or competence of any agency, and no such person or party shall in any manner be made to suffer, through

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the subsequent exercise of administrative powers or otherwise, the consequences of any unwarranted or avoidable administrative delay in determining any such matter. In all cases in which an administrative hearing is required by law and the parties are not in default, matters not susceptible of informal disposition in whole or part shall be promptly heard and decided, except that in fixing the times and places for formal or informal proceedings due regard shall be had for the convenience and necessity of the parties or their representatives. In any case subject to section 4 (except financial reorganizations) in which an administrative license or permission is required by law and due request is made therefor but no final administrative action is taken, such license or permission shall be deemed granted in full to the extent of the authority of the agency unless the agency shall within sixty days of such application have set the matter for formal proceedings required by this Act.

*Comment.*—The main clause of this subsection merely recognizes the right of parties to appear before administrative agencies and be accorded facilities for the negotiation or settlement of any matter within the jurisdiction of the agency; and it is thus designed to inform both the uninitiated administrator and the unfamiliar party of the right of appearance, thereby precluding either administrators or parties from the view that interviews and negotiations must be handled through favored representatives or as a discretionary dispensation.

The first proviso is a recognition that, in the administrative process, the right to counsel shall be accorded as of right just as recognized by the Bill of Rights in connection with the judicial process and as proposed by both majority and minority of the Attorney General's Committee (*Final Report*, pp. 193, 219).

The second proviso is designed to do what is possible to remedy the notorious delays in the administrative process, since "expedition in the disposition of cases is commonly a major objective of the administrative process" (*Final Report*, Attorney General's Committee, pp. 327 *et seq.*). It relieves the private parties from consequences of any "unwarranted or avoidable administrative delay", provides that formal procedures shall be promptly set and concluded, and makes essential provision for cases in which licenses are required by law but administrative agencies fail to act.

(b) **Investigations.**—Every agency shall exercise its authorized investigative powers only through its regularly authorized representatives, within its jurisdiction, and for its authorized purposes; and such exercise shall not disturb rights of personal privacy and shall not be conducted in such manner as to disturb private occupation or enterprise beyond the requirements of adequate law enforcement: *Provided, moreover*, that the exercise of such powers or use of information so acquired for the effectuation of purposes, powers, or policies of any other agency or person shall be unlawful except as expressly authorized by statute; and no process, inspection, or report shall be issued or required unless substantially necessary to the operation of the agency, nor shall any person be requested to consent to such process or in-

spection, or to submit such reports, in excess of lawful requirements.

*Comment.*—Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute in order to inform administrators, parties, counsel, or courts for whom there is not available an administrative law library.

It may be germane to note at this point that the only collection or digest of current decisions and precedents in the field of federal administrative law is the "treatise" portion of a loose leaf service entitled "Federal Administrative Procedure" and issued by Commerce Clearing House; for other materials of administrative law, and the difficulties of securing them, see the "Brochure on Administrative Law" issued in August, 1943, by the Judicial Section of the American Bar Association, pp. 49-53, and ¶1005 of the Federal Administrative Procedure loose leaf service mentioned above (which also contains a loose leaf bibliography of unofficial writings).

(c) **Subpoenas.**—Every agency shall issue subpoenas authorized by law to private parties upon request and, as may be required by its general rules of procedure, and upon a simple statement of the general relevance and reasonable scope of the testimony or other evidence so sought; and such subpoenas shall be issued at the request of private parties as freely as upon requests of representatives of the agency: *Provided, moreover*, that the names of witnesses and the purpose and nature of the evidence so sought shall not be made available to agency prosecutors or investigators. Upon contest of the validity of any administrative subpoena or upon the attempted enforcement thereof, the court shall determine all questions of law raised by the parties, including the authority or jurisdiction of the agency in law or fact, and shall enforce (by the issuance of a judicial order requiring the future production of evidence under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

*Comment.*—Statutory provisions conferring administrative subpoena powers are usually cryptic and incomplete. They confer powers, but say nothing of the conditions of issuance or the rights of private parties. The subsection above is designed (1) to assure that private parties as well as agencies shall have a right to such subpoenas which is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purposes, (2) limit the showing required of private parties so that they may not be required to disclose their entire case for the benefit of agency prosecutors, and (3) recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The "haphazard" and often unfair methods of

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issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415).

(d) **Attorneys and agents.**—Except as authorized by law and upon adequate findings that substantial public interest will be served thereby, no agency shall impose requirements for the admission of attorneys to practice before it or its officers or employees; and, in the event that requirements for the admission of attorneys to such practice are imposed by any agency, attorneys in good standing admitted to practice in the highest court of any State or Territory or in any federal court shall, upon their written representation to that effect, be admitted to such practice: *Provided, however*, that the Patent Office may require such evidence of technical proficiency as may be reasonably necessary. Any agency may by rule restrict the practice or admission to practice of other persons than attorneys or, until the lapse of two years from the date of termination of their official connection or employment, of former officers or employees of any agency; and any agency may, upon hearing and decision in accordance with sections 6 and 7, suspend or preclude any person from practicing before it, subject to judicial review pursuant to section 9 as to the reasonableness in law or upon the facts of such suspension or debarment.

*Comment.*—The need for simplification of the requirements for admission of attorneys to practice before administrative agencies was recognized by the Attorney General's Committee (*Final Report*, p. 124). The only valid exception is the case of the Patent Office, where special scientific knowledge and technical training are required. Most agencies have simplified their practice requirements to conform to the rule stated by the above subsection, or have done away with such requirements completely (see the recent revision of rules by the Department of the Interior, 8 F.R. 7023 and 7283). Such simplification is not for the benefit of the specialist, but for the counsel from afar who is suddenly required to accompany a client to Washington and, on arrival, finds himself not admitted to practice before the agency concerned. The remainder of the provision merely restates the law or practice as to non-lawyers, former government employees, and suspension or debarment.

**SEC. 6. HEARINGS.**—No administrative procedure shall satisfy the requirement of a hearing pursuant to sections 3 or 4 unless—

*Comment.*—As stated in the introductory comment to section 4, the following requirements of hearing procedure are not designed to require hearings where Congress has not already done so by statute.

(a) **Presiding officers.**—The case shall be heard (1) by the ultimate authority of the agency or (2) by one or more subordinate hearing officers designated by the agency from members of the board or body which comprises the highest authority therein, state representatives authorized by statute to preside at the taking of evidence, or examiners appointed as provided herein: *Provided, however*, that, in the event hearing or deciding officers are no longer in office or are unavailable because of death, illness, or suspension, other such officers may be substituted in the sound discretion of

the agency at any stage of proceedings required by this section and section 7: *Provided, moreover*, that the functions of all hearing officers, as well as of those participating in decisions in conformity with section 7, shall be conducted in an impartial and considerate manner, in accord with the requirements of this Act, with due regard for the rights of all parties as well as the facts and the law, and consistent with the orderly and prompt dispatch of proceedings; that such officers, except to the extent required for the disposition of *ex parte* matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, any party directly or indirectly except upon opportunity for all other parties to be present and in accord with the public procedures authorized by this section and section 7; that copies of all communications with such officers shall be served upon all the parties; and, that upon the filing of a timely affidavit of personal bias or disqualification of any such officer at any stage of proceedings, the agency or another such officer, after hearing the facts, shall make findings, conclusions, and a decision as to such disqualification which shall become a part of the record in the case and be reviewable in conformity with section 9 and subsection (c) of section 7; *And provided, further*, that, subject to the civil service and other laws insofar as not inconsistent with the provisions of this Act, there shall be appointed for each agency as many duly qualified and competent examiners as may from time to time be deemed necessary for the hearing or decision of cases, who shall perform no other duties, shall be removable only after hearing and for good cause shown, and shall receive a fixed salary not subject to change except that within one year from the effective date of this proviso the Civil Service Commission shall survey and adjust examiners' salaries within minimum and maximum limits of \$3000 and \$9000, respectively, in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed; and agencies occasionally or temporarily insufficiently staffed may borrow examiners from other agencies upon application to, and selection and designation by, the Civil Service Commission.

*Comment.*—The foregoing provision is designed to replace the elaborate and lengthy proposals of the Attorney General's Committee for the creation of a new and special office to approve "hearing commissioners" authorized to preside at administrative hearings (*Final Report*, pp. 196-198, 221-223 and 237-239). It is felt that the same, or better results may be achieved by utilizing the Civil Service System and by stating the nature of the duties of hearing and deciding officers. Indeed, definite advantages are secured because the title "examiner" has already become established, the Civil Service System need not be duplicated, and examiners will be accorded more nearly the status of judges if they are given tenure for good behavior rather than a definite and limited term.

(b) **Hearing powers.**—Officers presiding at hearings shall have power, in accordance with the published rules of the agency, to (1) administer oaths and affir-

mations, (2) issue such subpoenas as may be authorized by law, (3) rule upon offers of proof and receive relevant oral or documentary evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing or the conduct of the parties, (6) hold informal conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural motions, requests for adjournment, and similar matters, and (8) make or participate in decisions in conformity with section 7.

*Comment.*—The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (*Final Report*, pp. 43-53 particularly at pp. 45-46 and 50).

(c) **Evidence.**—The principles of relevancy, materiality, probative force, and substantiality as recognized in federal judicial proceedings of an equitable nature shall govern the proof, decision, and administrative or judicial review of all questions of fact: *Provided, moreover*, that, until the contrary shall have been shown by such competent evidence, the character and conduct of every person or enterprise shall be presumed lawful. In every case in which the burden of proof is upon private parties to show right or entitlement to privileges, permits, or benefits, their competent and uncontradicted evidence (other than opinions or conclusions) to that effect shall be presumed true until and unless discredited or contradicted by other competent evidence. Every party shall have the right of cross-examination and the submission of rebuttal evidence in open hearing except that any agency may adopt procedures for the disposition of contested matters in whole or in part upon the submission of sworn statements or written evidence subject to opportunity for such cross-examination or rebuttal. The taking of official notice beyond the proof adduced in conformity with this section shall be unlawful unless of a matter of generally recognized or scientific fact of established character and unless the parties shall both be notified (either upon the record or in reports, findings, or decisions) of the specific matters so noticed and, before or after the decision becomes final, accorded an adequate opportunity to show the contrary by evidence. No sanction, prohibition, or requirement shall be imposed or grant, permission, or benefit withheld in whole or in part except upon evidence which on the whole record is competent, credible, and substantial.

*Comment.*—No attempt is made to require the application of the so-called "common law" or "jury trial" rules of evidence in administrative hearings. "The absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law rules' of evidence for jury trials" (*Final Report*, Attorney General's Committee, p. 70). As a matter of fact, those rules are no longer applicable in judicial trials, at least in trials in equity or before a court sitting without a jury. On the other hand, where private parties have the burden of proof, or seek to adduce evidence or establish

defenses, agencies often require precisely that conformity with technical and outmoded rules of proof. Some recognizable rule, therefore, should be adopted for both private parties and government agencies. That some rule is necessary is evident from the fact that courts require administrative action to be supported by "substantial evidence." As a result, "although administrative agencies may be freed from the observance of strict common law rules of evidence for jury trials, it is erroneous to suppose that agencies do not . . . observe some 'rules of evidence,'" regulations of some agencies "embody extensive rules governing the modes of proving . . . crucial issues," and the Attorney General's Committee "found no general pattern of departure from the basic principles of evidence among administrative agencies" (*Final Report*, p. 70). Accordingly, the "principles . . . recognized in federal judicial proceedings of an equitable nature" would seem to afford a sound and simple basis for administrative hearings. Indeed, the equity rules of evidence were required by statute for the Board of Tax Appeals (Sec. 1111, Internal Revenue Code) and non-jury rules obtaining in federal courts have been voluntarily adopted by the Federal Communications Commission (Rule 1.211, Rules of Practice and Procedure). The main clause of the above subsection does not require any "rule" but merely recognition of the "principles of relevancy, materiality, probative force, and substantiality."

The first and second sentences of the proviso are designed to preclude a situation where, when private parties are under burden to show entitlement pursuant to statutes conferring rights or privileges, an administrative agency may sit mute, offer no evidence, and still be in a position to deny application and ignore uncontradicted evidence upon the theory that it has absolute discretion to judge "credibility." If, in such cases, agencies have evidence contradicting the showing of private parties, they should produce it; for only in that fashion may a record be made upon which the real situation will be brought into the open and the parties accorded an opportunity to combat any evidence against them.

The third sentence of the proviso is designed to recognize the rights of cross-examination and rebuttal, permitting agencies to receive written evidence subject to such rights as recommended by the Attorney General's Committee (*Final Report*, pp. 69-70).

The fourth sentence of the proviso embodies the rule of official notice recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an "opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed" (*Final Report*, pp. 71-73).

The final sentence of the proviso is intended to require that the principles of evidence be followed in making decisions as well as in making the administrative record. The sentence, in short, merely ties in the evidence requirement with decisions (required to be made in conformity with section 7) as well as with hearings (required to be conducted in accordance with section 6).

(d) **Record.**—The transcript of testimony adduced and exhibits admitted in conformity with this section, together with all pleadings, exceptions, motions, requests, and papers filed by the parties other than separately presented briefs or arguments of law, shall constitute the complete and exclusive record and be made available to all the parties.

*Comment.*—The foregoing subsection is designed, as it states, to make the record both exclusive as to the facts and available to all the parties.

## ADMINISTRATIVE PROCEDURE ACT

SEC. 7. DECISIONS.—In all cases in which an administrative hearing is required to be conducted in conformity with section 6—

*Comment.*—This section, like section 6, applies only in cases included within the scope of section 4—that is, cases in which both a hearing is required by statute and there is no trial *de novo* subsequently in any court. It is thus limited in its coverage to those instances in which Congress has required an administrative hearing—and hence has assumed that fair decision procedures will be followed—and in which the parties have no subsequent opportunity to try out their whole case in some court.

(a) **Initial submission.**—At the conclusion of the reception of evidence, the officer or officers who presided shall afford the parties due notice and adequate opportunity for the submission of briefs, proposed findings and conclusions, and oral argument for consideration in preparing an intermediate report or initial decision in conformity with this section.

*Comment.*—This subsection contains nothing more than a statement of current practice to submit briefs, proposed findings and conclusions, and oral argument to the officer or officers who presided at the reception of evidence, for their consideration in preparing the intermediate report now typical or the initial decision authorized by subsection (b) which follows.

(b) **Report or decision.**—Thereupon, (1) with or without first certifying to the agency any unusually novel or difficult questions of law for instructions, any subordinate officer or officers who heard the evidence shall find all the relevant facts and enter an appropriate order, award, judgment or other form of determination or (2) the agency, upon the petition of all the private parties or upon its own motion or by general rule, shall require the entire record certified to it for initial decision: *Provided, moreover*, that, in cases in which subordinate officers so render initial decisions and in the absence (within such reasonable time as it may prescribe by general rule) of either an appeal to the agency (upon such specification of errors as it may require by general rule) or review upon the agency's own motion and specification of issues, such decisions shall without further proceedings become final determinations and be effective, enforceable, and subject to judicial review pursuant to section 9 to the same extent and in the same manner as though duly heard, decided, and entered by the agency itself: *And provided, further*, that, in all cases in which the agency either responds to questions of law certified by subordinate hearing officers for instructions or makes the initial decision, an intermediate report of specific recommended findings of fact and conclusions of law upon all relevant issues presented by the whole record shall be made and issued by the officer or officers who presided at the taking of evidence; and thereupon the agency shall afford all parties reasonable opportunity for the submission of briefs, proposed findings or conclusions, and oral argument before it upon the basis of such report and any further specification of issues it may indicate.

*Comment.*—The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency for which they sat but should go further and make an initial decision binding upon the parties in the absence of administrative or judicial review (*Final Report*, pp. 50-51). The foregoing subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make recommended findings and conclusions for the further consideration of the agency. Such a provision not only allows the agency a discretion to be adapted to different subjects or cases, but it does not require a sudden break with current practice.

(c) **Administrative review.**—Upon appeal to the agency from the initial decisions of subordinate officers or the review thereof on its own motion, the agency shall (1) afford the parties due notice of the specific issues to be reviewed, (2) provide an adequate opportunity for the presentation of briefs, proposed findings and conclusions, and oral argument by the parties, and (3) affirm, reverse, modify, remand, or set aside in whole or in part such decision: *Provided, however*, that the failure of the parties to seek, or of the agency to require, such review shall not affect the right of judicial review pursuant to section 9.

*Comment.*—The foregoing subsection is intended to do no more than provide for the administrative review of examiners' decisions by the agency in cases in which, pursuant to subsection (b) above, the agency has permitted the presiding examiners to make the initial decision. To that extent it accords with the conclusions of the Attorney General's Committee (*Final Report*, pp. 51-52, 53).

(d) **Consideration of cases.**—All issues of fact shall be considered and determined exclusively upon the record required to be made in conformity with section 6. In the formulation and submission of intermediate reports or in the decision of any case initially or upon review of decisions of subordinate officers, all hearing, deciding, or reviewing officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties; and no such officer, clerk, or assistant shall consult with or receive oral or written comment, advice, data, or recommendations respecting any such case from other officers or employees of the agency or from third parties: *Provided, however*, that nothing in this section shall be taken to preclude any officer or employee of an agency from presenting for the consideration of hearing, deciding, or reviewing officers briefs, argument, or proposed findings, reports or decisions upon due notice to and adequate opportunity for all parties to meet such proposals by briefs and oral argument.

*Comment.*—The foregoing subsection merely requires that findings and decisions be made by the agency or by subordinate deciding officers upon the exclusive record of the hearing (see subsection (d) of section 6) without the *ex parte* intervention of agency prosecutors or third parties. The provision accords with the views of the Attorney General's Committee: "Like judges . . . each agency head may

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find it useful to have attached to his office one or more law clerks. . . . But these assistants should be aides and not substitutes. The heads of the agency should do personally what the heads purport to do. . . . Review should be given by the officials charged with the responsibility for it, and the reviews so given should include a personal mastery of at least the portion of the records embraced within the exceptions. . . . If the agency head . . . does review a case, he must assume the burden of personal decision" (*Final Report*, pp. 52-53).

(c) **Findings and opinions.**—All final decisions and determinations, whether of subordinate officers or initially or upon review by the ultimate authority within the agency, shall be stated in writing and accompanied both by a statement of the reasons therefor and by separately stated findings of fact and conclusions of law upon all relevant issues raised by the parties upon the whole record: *Provided, moreover*, that the findings and conclusions in every such case shall encompass all relevant facts of record and shall themselves be relevant to, and shall adequately support, the decision and order or award entered: *And provided, further*, that such statements of reasons, findings and conclusions shall include matters of administrative discretion as well as of law or fact.

*Comment.*—The requirement of findings and conclusions, coupled with a statement of reasons, is indispensably necessary so far as administrative agencies undertake to make decisions upon the record of a hearing. The Attorney General's Committee pointed out the desirability of written opinions or statements of reasons (*Final Report*, pp. 29-30). To the suggestion that agencies should not be required to render decisions in all cases, the simple answer would seem to be that such agencies need not render the usual elaborate administrative opinion but may utilize the brief statements or even a single sentence so often issued by courts in cases in which the question is simple or governed by prior decisions.

The first proviso merely restates the rule that findings and conclusions must be based upon the relevant facts of record, and themselves support the order or award entered. The second proviso is designed to require administrative agencies to determine not merely whether they have power but whether and why, upon the facts, their discretion should be exercised; such a requirement is illustrated in the decision of the Supreme Court that when an agency determines only "the dry legal question of its power" it fails to determine "whether in employing that power the policies of the Act [involved] would be enforced" (*Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194-197 [1941]).

(f) **Service.**—All administrative findings, conclusions, opinions or statements of reasons, rules, or orders required to be made in conformity with this section shall be served upon all the parties and intervenors or other participants in the proceeding as well as upon all persons whose attempted intervention or participation has been denied and all interested persons who request in writing to be so notified.

*Comment.*—The foregoing subsection, in addition to requiring service upon parties and intervenors in any proceeding, requires service also upon the parties denied participation or requesting notification. The latter requirement is necessary because of the country-wide jurisdiction of ad-

ministrative agencies, the general effect of their decisions, and the fact that interested persons may be so far removed from the place of hearing or decision as to be placed under unnecessary difficulty to secure information as to the findings and results of a given case. Since agencies usually mimeograph their findings and decisions and since the published volumes of their reports do not appear immediately (sometimes not for years), such a provision will not be burdensome. Most agencies, in fact, follow such a requirement in practice.

SEC. 8. **PENALTIES AND BENEFITS.**—Whether the challenged act is that of one or more officers or agencies, under one or more statutes or other grants of authority, or exercised through a combination of functions or procedures—

*Comment.*—The following provisions relate to the field of administrative "sanctions"—that is, the penalties or remedies imposed by administrative agencies. The introductory clause above is designed to include the situation arising when a combination of agencies or authorities is involved.

(a) **Limitation.**—Any sanction, penalty, prohibition, remedy, relief, assistance, license, permit or other requirement, grant, or permission imposed or dispensed by any agency subject to this Act shall be unlawful to the extent that it is in excess of administrative authority or withholds privileges or benefits in derogation of private right: *Provided, moreover*, that no agency shall impose penalties, forbid or require action, or provide remedies not both specified by statute and expressly delegated to such agency by law.

*Comment.*—The main clause of the foregoing provision is designed to afford statutory recognition for the basic rule of law embodied in scattered judicial decisions, and the proviso is designed to emphasize the elimination of the so-called "extra-legal" sanctions sometimes attempted by administrative agencies. The creation of penalties or benefits is exclusively the province of Congress as is the determination of statutory rights or privileges; administrative agencies should not attempt to enlarge upon the one or diminish the other. The practical situation sometimes existing is that there is no method whereby extra-legal sanctions may be reached and prevented. The foregoing subsection, however, will not only afford a rule of law as to sanctions and benefits but it will withdraw any vestige of official privilege to impose extra-legal sanctions.

(b) **Rules.**—The limitations, requirements, prohibitions, or penalties imposed by any rule shall not exceed the scope of the statutory authority of the issuing agency; and no rule shall withhold, in whole or in part, permissions, privileges, relief, benefits, or remedies in derogation of law or statutory entitlement: *Provided, moreover*, that the administration of, procedures prescribed by, enforcement conducted pursuant to, and sanctions or penalties created in any rule shall be subject to this Act.

*Comment.*—Subsection (b) applies the basic limitation of subsection (a) to rules. The proviso is required to assure that administrative procedures prescribed by rule shall not escape the procedural requirements of the proposed act.

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# CAN A TRIAL COURT OF THE UNITED STATES BE COMPLETELY DEPRIVED OF THE POWER TO DETERMINE CONSTITUTIONAL QUESTIONS?

By WILLIAM G. McLAREN

of the Seattle Bar

THE Emergency Price Control Act of 1942 provides for the appointment of an Administrator, authorizes him to establish maximum price schedules, and makes any violation thereof a criminal offense. The district court of the district where the violation occurred is given jurisdiction of such criminal proceedings. (50 U. S. C. A. App. Sec. 925). Up to this point the Act in the main follows the usual pattern.

## Procedure for Testing Validity of Schedules

The statute is unusual, however, in providing an exclusive procedure for testing out the validity of any such schedule. Briefly, this consists of filing with the Administrator a protest, which must be done within sixty days after the effective date of the schedule. The Administrator is authorized to limit these proceedings "to the filing of affidavits or other written evidence and the filing of briefs." (Sec. 923). If the protest is denied the objector may within thirty days thereafter file a complaint with the "Emergency Court of Appeals", which is created by the Act. In this court no evidence shall be considered except that which is contained in the transcript of proceedings required to be sent up to the court by the Administrator. However, if application is made the court may permit the introduction of evidence which may have been offered but not admitted "or could not reasonably have been offered to the Administrator." If "the court determines that such evidence should be admitted" it "shall order the (additional) evidence to be presented to the Administrator." (Sec. 924 (b)).

Sec. 924 (b) provides that this emergency court and the Supreme Court, upon review, "shall have exclusive jurisdiction to determine the validity" of any regulation, order or price schedule and that

except as provided in this section no court, federal, state or territorial, shall have jurisdiction, or power to consider the validity of any such regulation, order or price schedule, or to stay, restrain, enjoin, or set aside in whole or in part any provision of this act authorizing the issuance of such regulations or orders or making effective any such price schedule.

Assuming that there is no general constitutional defect in the Act, such as a lack of proper legislative standards, the question arises whether this denial of jurisdiction is only partial and applies only to affirm-

ative actions or proceedings which some individual might bring to enjoin enforcement.

Such partial denial of jurisdiction was considered and applied in the recent decision of *Lockerty v. Phillips*<sup>1</sup>. There the plaintiff sought to enjoin the United States Attorney from the prosecution of certain pending and prospective criminal proceedings against him for violation of the Act. In sustaining the ruling of the district court that it was without jurisdiction of the cause, the Supreme Court applied the well known principle that the power of Congress over inferior courts included the power

of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.

The court expressly reserved the question of whether an absolute denial of any jurisdiction would be constitutional, saying:

We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

## A Significant Caveat

But if the language denying jurisdiction is to be interpreted literally then it would absolutely prevent a trial court from considering any question of invalidity even when urged by a defendant in either a civil or criminal proceeding brought under the Act. The provision was so interpreted and its validity sustained in the recent decision of *Rottenberg v. U. S.*,<sup>2</sup> Circuit Court of Appeals for the First Circuit. Rottenberg had been indicted on a charge of making sales of commodities in violation of the price schedule. At the trial in the district court he offered evidence tending to show that the schedule was "arbitrary" and hence void. (Sec. 924(b)). The district court refused to admit such evidence on the ground it was without jurisdiction to consider the validity of the schedule. A conviction was had and on appeal the action of the lower court was affirmed. The Court of Appeals said:

1. 87 L. ed. Adv. Ops. 958.

2. 137 F. (2d) 850.

## POWER TO DETERMINE CONSTITUTIONAL QUESTIONS

Since the wartime power of Congress to control prices includes the power to adopt such means to this end as might rationally be considered necessary for the effective administration of the regulatory program *the only question remaining to the courts under the Fifth Amendment is whether Congress had any rational basis for its judgment that administrative necessities in a scheme of nationwide price regulation require that price regulations issued by the Administrator must be generally observed until the regulations are set aside pursuant to an orderly review procedure set forth in the act.*" (Italics supplied)

It would seem that the above quotation does not contain "the only question" which must be considered in determining the validity of this procedure.

### Due Process Continues in Time of War

Admittedly the war powers of Congress include that of controlling prices but it does not follow that Congress may disregard the Constitution in prescribing methods of enforcement. "Due process of law" continues to exist even in time of war.

(1) The Constitution, Art. III, Sec. 1, provides that: *The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.* (Italics supplied)

Admittedly this authorizes Congress to abolish such inferior courts entirely, to grant or withhold jurisdiction over certain classes of cases, and to withhold the power to grant certain remedies, such as injunctive relief. All of this is illustrated by the *Lockerty* decision above noted, as well as by many others.

But does it include the right to reach into the very essence of "judicial power" and, while *ostensibly* giving jurisdiction over a particular case, at the same time to deprive the court of the very essence of the thing mentioned in and granted by the Constitution, namely, "judicial power", or the power to declare the law? By this statute Congress in effect says to the United States District Court, "You are an inferior court, you have jurisdiction over certain actions, both civil and criminal, which may be brought pursuant to this statute, but we withhold from you the right to consider any constitutional objections which a defendant thus haled before you may urge as against any regulation or schedule."

### Congress Cannot Withhold Courts' Right to Declare the Law

But this right to declare the law as to a case which is committed to the court's jurisdiction comes from the Constitution itself as an essential element of judicial power thereby granted and is not to be conditioned or withheld by any act of Congress. This in fact is the basis for the doctrine that any court ever has a right to declare a statute unconstitutional and void. This power has its origin in the terms of the Constitution and is not subject to curtailment by statute.

If such statutory power exists, then a way has been found to destroy or at least impair the right of the courts to pass upon constitutional questions.

This question of the right of Congress to invade or curtail the exercise of the essence of judicial power is not concerned with whether or not the substitute procedure is "adequate" although the inadequacy of such substitute procedure would be an additional argument against its validity. Rather, the question is one of Congressional power to do *anything* purporting to curtail or limit a power derived from the Constitution. As to this point, the "adequacy" of some proposed substitute procedure would be immaterial. Jurisdiction is one thing, judicial power is another. Congress can control the one but not the essentials of the other. It would seem inconsistent to say that the courts possess a power directly from the Constitution to pass on the validity of statutes (although no such express provision, other than the grant of "judicial power", is found in the Constitution) and at the same time to say that such a power so derived from the Constitution can be interfered with by a Congressional enactment.

In *Martin v. Hunter's Lessee*,<sup>3</sup> Mr. Justice Story, in discussing this provision of the Constitution said the expression "shall be vested" was mandatory:

If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest *the whole judicial power*. The language, if imperative as to one part, is imperative as to all.

And, again,

Congress cannot vest *any portion* of the judicial power of the United States except in courts ordained and established by itself. (Italics supplied)

The Court further fortified this conclusion by comparing the language of Section 1 with that of Section 2, which gives the Supreme Court appellate jurisdiction "with *such exceptions* and under such regulations as the Congress shall make", saying this exception in Section 2 shows that the language of Section 1 was imperative. The Court also observed that even though this language of Section 1 were not mandatory and even if Congress might *omit* to vest the judicial power in courts,

It cannot be denied that *when it is vested it may be exercised to the utmost constitutional extent.* (Italics supplied).

This "constitutional extent" certainly includes the power to declare a statute unconstitutional.

The fact that this attempted denial of jurisdiction in the *Rottenberg* case extended only to the validity of the regulations or schedules and not to the Act itself is immaterial. In fact, one method of attacking their validity would be by attacking the statute itself. And again since these regulations are given the full effect of law and their violation is made a crime it is difficult to see any distinction in this connection between a statute and a regulation.

### Congress Cannot Grant Judicial Power to a Non-Judicial Agency

(2) In any event Congress could not thus parcel out

3. 1 Wheat. 330, 4 L. ed. 97.

## POWER TO DETERMINE CONSTITUTIONAL QUESTIONS

some element of the judicial power to a non-judicial agency or to a non-judicial form of procedure.

In *Den v. Hoboken Co.*,<sup>4</sup> the Court said:

The Constitution contains no description of those processes (due process of law) which it was intended to allow or forbid. . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial power of the government and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.

The Court said that in answering such a question

We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. The Court concluded its discussion by saying:

To avoid misconstruction on so grave a subject we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.

This language was quoted in the case of *Fong Yue Ting v. U. S.*<sup>5</sup>

In *U. S. v. Carolene Co.*,<sup>6</sup> the Court said:

We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality . . .

and

that a statute would deny due process which precluded the *disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.* (Italics supplied)

### Are the Parties Denied Opportunity of Cross-Examining Witnesses?

The Price Control Act provides as an exclusive substitute a so-called original "hearing" before an Administrator. In the first place the Administrator is not capable of giving an impartial decision since he is called upon to decide whether his own official act was arbitrary or capricious. No man can impartially sit in judgment on his own conduct. Men do not readily even recognize, much less openly admit, that they have committed error, although alert to discover error in others. The impropriety of such a procedure would be recognized as a basis for disqualification by even the most rural justice of the peace to be found in the land.

The Rottenberg opinion does not discuss this situation but apparently this point was in the mind of the court when it said:

It was not to be anticipated that he (the Administrator) would glory in being "arbitrary or capricious," or that he would be loath to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable."

There is no basis for this optimistic view. In fact, all human experience is to the contrary. The inability or unwillingness to recognize or admit one's own mistakes is not removed or even lessened by the individual's

being elevated to public office. On the contrary, there are some who believe that the very assumption of public office tends to beget in the holder a certain additional assurance of his own rectitude, amounting almost to absolute infallibility.

In the second place the Administrator is authorized to require that all evidence be submitted in the form of *ex parte* "affidavits or other written evidence." This denies the party one of the most fundamental essentials of a hearing, namely, the right to confront and cross-examine witnesses. This right is of exceeding importance where the issue is whether or not the price schedule which the accused is criminally charged with violating, is "arbitrary or capricious", and hence void. Evidently Congress believed it possessed the power "by its mere will" to decide what was due process of law. The Act even purports to affect the power of state courts. This objection is not overcome by the fact that the party is given a right to appeal to the "Emergency Court of Appeals". First, because as a matter of constitutional right, he as a defendant is entitled to have an original hearing in a court and not be required to take an appeal in order to obtain his first opportunity to have a court trial; and, secondly, because the only evidence which even this court of appeals can consider must be in the same form of *ex parte* "affidavits and other written evidence." It may, in fact, be confined to such as were submitted to the Administrator. It is discretionary with the emergency court whether to permit additional evidence to be submitted, but if so "such additional evidence will be ordered submitted to the Administrator" and, of course, be in the same affidavit form. At no point is the complainant given the opportunity of cross-examining witnesses.

### War Does Not Suspend Constitutional Rights of Individuals

(3) As to criminal proceedings there is the additional objection based on the Constitution, Art. III, Sec. 2, which provides that—

The trial of *all* crimes except in cases of impeachment shall be by jury, and such trials shall be held in the state where the said crimes shall have been committed. (Italics supplied)

The above provision contains only one exception, namely, "cases of impeachment". It contains no exception in favor of trials for violations of war measures. The very fact that one exception is expressed negatives the possibility of there being any other exception implied. This language seems so imperative, as to preclude all possibility of a legal or constitutional trial of any element or issue of a criminal defense being had before any tribunal other than a court and jury or in any jurisdiction outside the state where the alleged violation occurred. This special procedure would seem to violate both of these requirements. It must not be overlooked that its effect is to require the accused to try out *in advance* a very vital portion of his defense elsewhere than before the district court in which his

4. 59 U.S. 372, 15 L. ed. 372.

5. 149 U.S. 698, 37 L. ed. 906.

6. 304 U.S. 144, 82 L. ed. 1234.

## POWER TO DETERMINE CONSTITUTIONAL QUESTIONS

later criminal trial will be had. He must at his peril thus anticipate the trial of a portion of his defense, namely, the issue of the validity of the price schedule which he is charged with having violated. He is required to be bound by this advance determination of this issue when he later enters upon the supposed "trial" of the remaining portion of his defense. Any relevant evidence which might meanwhile have been discovered or come into existence would have to be rejected by the district court.

The opinion in the *Rottenberg* case intimates that a different conclusion might be reached "if the regulation, as a pure matter of law, were invalid on its face." But in view of the sweeping character of this statutory denial of any jurisdiction to the district court to consider the validity, there would seem to be no sustainable basis for such a distinction. The language of the statute is that no court "shall have jurisdiction or power to consider the validity."

The fact that this is a war measure does not furnish adequate support for this substitute exclusive procedure. The opinion in the *Rottenberg* case stresses the "damaging results" to the price control program which would result—

if a violator could procure an acquittal in a criminal case by convincing the particular district court or jury that the regulation is arbitrary or capricious . . .

pointing out that thereby the Act would be unenforceable in some districts and enforceable in others. But such argument would seem to constitute merely a very frank and open attempt to strike down the very constitutional right which the above provision guarantees to one accused of a crime. He is entitled—

to procure an acquittal in a criminal case by convincing the particular district court

in the state where the violation occurred that the law or regulation is void. This constitutional provision as above noted contains no war measure exceptions and it must be conclusively presumed that none was intended. However desirable it may be from the government's standpoint to have a uniformity of rulings it should not be obtained or even claimed at the expense of the constitutional rights of the individual who is placed under a criminal indictment. It is not true that a state of war suspends constitutional rights, although it may call into operation the exercise of certain constitutional powers of the government which do not exist except in wartime.

In *Home Building & Loan Assn. v. Blaisdell*,<sup>7</sup> the Court said:

But even the war power does not remove constitutional limitations safeguarding essential liberties.

And again, in *Nebbia v. New York*,<sup>8</sup> the Court said:

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by

securing that the end shall be accomplished by methods consistent with due process. (Italics supplied)

The *Rottenberg* opinion refers to the "Japanese curfew case," *Hirabayashi v. U. S.*,<sup>9</sup> in which the Court sustained the validity of an executive order ratified and approved by an act of Congress authorizing the establishment of a military area within which all persons of Japanese ancestry were placed under the curfew requirement. But in that case the accused was regularly charged, tried and convicted in the proper district court of the United States in accordance with constitutional processes. The constitutional question was not one of procedure but whether in a state of war it was competent for Congress to authorize the establishment of a military area within which this curfew order should control the activities of Japanese persons. What the Court held was that this was a military question, and the Court, in speaking of the validity of these orders and their military basis, said:

Nor, can we deny that Congress and the military authorities, acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power.

The *Rottenberg* opinion says of the "Japanese curfew case" decision that it sustained—

a discrimination which would ordinarily be abhorrent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress.

The reverse would seem to be true. As stated in the *Nebbia* decision, the Fifth and Fourteenth Amendments "condition the exertion of the admitted power." There the admitted power was the "general welfare." In the curfew case it was the "war power".

### Conclusion

And on principle it would seem that the preservation of our constitutional court processes for the settlement of all constitutional questions must be vastly more important than any particular decision which may result from the unimpaired operation of this system. This is our method for the settlement of such questions. In the exercise of this constitutional function the courts furnish the only tribunal in which a citizen can be heard for the determination and protection of his individual rights as against any excesses of power attempted against him by his own government. And when he is thus sued by his government in a local court possessing general jurisdiction he is not to be compelled to go elsewhere for the ascertainment and protection of his rights thus brought into question. The judiciary would seem to be in danger of losing its status as an independent branch of the government, if the courts should lose sight of the distinction between jurisdiction and judicial power, and by their holdings yield to the doctrine that Congress through its control over jurisdiction can also control the essential functions which the Constitution has conferred upon the judiciary.

7. 290 U.S. 417, 78 L. ed. 413.

8. 291 U.S. 525, 78 L. ed. 940.

9. 87 L. ed. Adv. Ops. 1337.

# EDWARD S. BRAGG

## SOLDIER, LAWYER and DIPLOMAT

By GEORGE R. FARNUM

of Boston  
Former Assistant Attorney General of the United States

*Great men, taken up in any  
way, are profitable company.*

—Carlyle

IN 1848 Wisconsin was admitted to the Union, the last state to be formed out of the old Northwest Territory. A land of rivers and lakes, of forests and prairie, and of great natural resources, in the last decades before the Civil War an increasing stream of immigrants filtered over her borders to try their fortunes in the opening and conquest of a new country. These were moving days in the East for bold and hardy men who felt the importunate urge of the pioneering instinct, and for those youths whose restless spirits were hotly stirred by the prospects of the adventure and romance which beckoned to them from beyond the setting sun.

Among those who found the call of the West stronger than home ties was twenty-three year old Edward S. Bragg, a native of Otsego, New York. With a newly acquired certificate of admittance to the New York Bar and fifty dollars in his pocket, he set his face toward the land of promise, arriving at Fond du Lac in 1850. A fellow immigrant rather curiously described it in a letter written that same year as "recalling to my mind the state of Carthage when Aeneas entered it," adding, "All persons busy about building. Some in this street—some in that street. All cluttering about business and building."

Bragg promptly hung out his shingle. Beginning with a fee of fifty cents for drawing a deed, in the ten years which followed he laid the solid foundations of a distinguished, though frequently interrupted, professional career. In 1854 he was elected district attorney.

This is the fourteenth in a series of biographical studies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL.

In April 1860 he was a Douglas delegate to the Democratic national convention which convened at Charleston, South Carolina, and which resulted in a disruption of the party. He returned home with the conviction that an armed conflict was inevitable. Reminiscing in after years, he declared, "When I came back from that convention and told the people around home that the breaking of the Democratic Party in the convention meant war between the North and the South, some of them thought I was losing my mind—some thought that I ought to be committed. But I knew that the South thought the North were all cowards, and I knew that the North thought the South were all bravado, and I knew that both were wrong."

With the outbreak of hostilities Bragg promptly offered his services to his country and proceeded to recruit a company of which he was elected captain and which adopted the name of "Bragg's Rifles." Without military instruction or experience, he set to work to supply the deficiency from such books as were available. He chalked off the marching steps on the floor of his office and practiced until he mastered them. His company was incorporated into the Sixth Wisconsin Volunteers and was ordered to join the Army of the Potomac as part of the command which earned the sobriquet of the "Iron Brigade."

An enumeration of the battles in which Bragg participated would include many of the bloodiest fields of the war. It has been asserted that the "Iron Brigade" sustained the heaviest casualties of any engaged and that the Sixth Wisconsin stood near the top of the list of Northern

regiments for the number of killed and wounded. In April, 1863, it sent home from the front the pathetic, but glorious, remnants of the regimental color presented it in the summer of 1861. Thus Bragg, then colonel of the regiment, wrote the governor of the state: "We part with it reluctantly, but its condition renders it unserviceable for the field service. When we received it, its folds, like our ranks, were ample and full; still emblematic of our condition, we return it, tattered and torn in the shock of battle. Many who defended it 'sleep the sleep that knows no waking'; they have met a soldier's death; may they live in the country's memory. The regiment, boasting not of deeds done, or to be done, sends this voiceless witness to be deposited in the archives of our state."

At Antietam he was severely wounded and carried from the field unconscious. After being revived and administered first aid, he insisted on resuming his place in the battle line. Such was the spirit of Bragg, the soldier. In June, 1864, he was elevated to brigadier general. Two months before Appomattox he parted from his old comrades-in-arms to assume special duties at Baltimore.

To the warrior, amid the feverish preoccupations of those hard and bitterly fought campaigns from the Peninsular to Petersburg, there came moods and moments when his mind wrestled with many of the deep and baffling problems of existence. Years afterwards, in discussing with a friend the necessity of a real and abiding faith in life, he observed, "Many a time I thought of that during the War, as I sat on horseback, in those still, quiet southern nights, gazing up at the southern cross, lost

in contemplation of the mystery of the universe, and of the relation of man to his Maker, and to his fellow man, and of that struggle in which I was engaged—brother against brother—until it seemed I was lifted out of my character as an actor and looked down upon it as a spectator. And then the clank of a saber borne distinctly for miles through those southern valleys on the still night air would call me back to reality."

He was a little man, weighing about one hundred and twenty pounds and came to be familiarly called by his men "the little General." He was a stickler for drill and discipline, so much so that he once remarked that he incurred at the outset the ill will of a considerable number of his command, adding however, "But once they were under fire they would do anything for me."

In the early fall of 1865 he was mustered out of service and returned to Fond du Lac, where he immediately resumed the practice of his profession. Intent as he was throughout his days on remaining in her good graces, the law never played in his life the role of a jealous mistress who demanded and received undivided loyalty. As he had abandoned her in the past for soldiering, so in the long years which lay ahead he was generously to share his attentions with her rivals—politics and diplomacy.

In 1868 he was elected to the state senate where he served two terms. From 1877 to 1887, with the exception of one term, he served his district in Congress. James Bryce is said to have remarked that he was the best extemporaneous debater in that body. He led the successful fight to set aside the action of the court martial which dismissed General Fitz-John Porter from the service for disobedience of General Pope's orders at Second Bull Run. The case had provoked much controversy and engendered great bitterness. Incidentally, Bragg had himself participated in the battle.

At the Democratic national convention in 1884, in seconding the nomination of Grover Cleveland and

speaking for the young men of Wisconsin, he declaimed, "They love him, gentlemen, and they respect him, not only for himself, for his character, for his integrity and judgment and iron will, but they love him most for the enemies that he has made." Asked later by a friend if he had met Cleveland before the convention, he replied, "No—but after I was chosen as a delegate I received a letter from a man in New York, whom I recognized as one of the Erie Canal ring, containing a most scurrilous attack on Cleveland, and I said to myself, 'This fellow has found me a candidate. Any man that is good enough for him to hate so much, is good enough for me to vote for for President.'"

Bragg was an unsuccessful candidate for the United States Senate in 1893. He stumped the state for his party the previous fall and was conceded a large measure of credit for its success. It was generally believed that he would be elected as a matter of course. When the legislature met, however, he was strongly opposed by rival candidates. It was charged at the time that money was lavishly spent to bolster opposition support. Bragg was defeated after protracted balloting. On the announcement of the result he sent this laconic wire to his wife, "Fallen at the breast-works, pierced by a golden bullet!"

At the end of his last term in Congress, President Cleveland designated Bragg Minister to Mexico. He had little time to serve, however, as the appointment expired with the administration the following year. In 1902 President Roosevelt appointed him Consul General at Hong Kong. In this post he served until 1906. He came back from the Orient with grave misgivings about Japan. Discussing the Far East situation with a friend, the old soldier declared, "Japan is spoiling for a licking, and she ought to get it now."

Those qualities which distinguished him as a soldier contributed to his success as an advocate. Conspicuous among them were courage, earnestness, sincerity, tenacity, resourcefulness and a keen insight into charac-

ter. It was once said of him, "He never shoots at random, but always at the mark. . . . His fire is never scattering but always concentrated." He handled witnesses with consummate skill, whether he was drawing from his own a clear, consecutive and convincing narrative, or exploring the vulnerability of those of his adversaries. His jury arguments were models for his day. In the appellate courts he was equally effective, coming prepared with a knowledge of the material texts and applicable decisions, and with the facts at his fingertips. He possessed the faculty of arousing interest and holding attention—one secret of successful advocacy.

As an example of the color that he frequently introduced into his work, a paragraph from one of his Supreme Court briefs must suffice.

In a sermon well worth reading and study, the Rector of St. John's Church of Los Angeles, declares, "The world spirit has invaded the Church, and has become so strongly entrenched there that many supposedly Christian folk quake and fear when they hear worldliness denounced from the pulpit, lest it might offend some mighty individual whose purse is more thought of than his personality."

He continued,

The same pushing power which moves unabashed into the Temple reared to the worship of God, has been moving silently, craftily, insiduously, attempting to make lodgment for its dogmas in the Temple of Justice. Such is my earnest conviction. I desire to record my warning voice in the hall where for more than half a century I have sat at the feet of the "Law Givers" dispensing justice, and had impressed in living characters upon my soul, conscience, and mind. "Truth is mighty and will prevail."

With his quick and resourceful mind and his love for intellectual fencing, he perhaps paid at times an undue deference to logical refinements and procedural technicalities. This characteristic led to the suggestion that he was not always the safest counsellor. In extenuation of this trait, Chief Justice Winslow, in responding to the memorial presented by the Bar on his death, said, "But it is only fair to remember in

(Continued on page 55)

## BIRMINGHAM REGIONAL MEETING

LAWYERS from seven states—South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Tennessee—convened at the Association's regional meeting held in Birmingham, Alabama, on the 9th and 10th of December. All sessions were held at the Tutwiler Hotel.

The first morning was devoted to the subject, "The Organized Bar in the War." President Henderson presided.

The welcome extended to those in attendance by Francis H. Hare and J. C. Inzer, the distinguished presidents of the Birmingham Bar Association and the Alabama State Bar Association, respectively, was warm and eloquent.

At the conclusion of Mr. Inzer's address, Mr. Henderson stated concisely the purpose of the meeting and then called upon the leaders of the discussion panel in the ensuing forum on "Legal Assistance to Military Personnel and their Dependents."

Lt. Colonel Milton J. Blake, Chief, Legal Assistance Branch, Judge Advocate General's Office, United States Army, spoke for the Army. He was followed by Captain James A. Roberts, Chief, Administrative Branch, Judge Advocate General's Office, United States Navy; Commander Richard Bentley, Chief, Legal Assistance Section, Judge Advocate General's Office, United States Navy; and Tappan Gregory, chairman of the Association's Committee on War Work.

Brigadier General John M. Weir, Executive Officer, Judge Advocate General's Office, United States Army, had been invited to speak, but illness prevented his attendance. His paper was presented to the meeting by Lt. Colonel J. Alton Hosch, Chief, Contracts Division, Judge Advocate General's Office, United States Army.

There followed a period of general discussion with questions from the floor and a brief review by Leonard J. Emmerglick, Adminis-

trative Assistant to the Association's Committee on Coordination and Direction of War Effort, of proposed amendments to the Servicemen's Dependents Allowance Act.

The morning session closed with questions remaining unanswered. In order to develop further free discussion of the subject of legal assistance to servicemen and their dependents, a separate meeting was held after the noon recess, attended by a number of civilian lawyers representing state bar association War Work Committees and between thirty-five and forty Legal Assistance Officers of the Army and Navy. Pinckney Cain, chairman of the South Carolina State Bar Association's Committee on War Work, and member of the American Bar Association Committee for the Fourth Circuit, and J. M. Peebles, chairman of the Tennessee State Bar Association Committee on War Work, spoke briefly of the work in their respective jurisdictions.

The regular afternoon session of the regional meeting devoted its attention to "Administrative Law" and "War Contracts."

Colonel Hosch, the first speaker, read a paper upon the subject, "Contracting with the United States—Fundamental Principles."

He was followed by Clarence H. Ross, counsel, Navy Department, Price Adjustment Board, whose title was "Renegotiation of War Contracts," and Captain Joseph F. Johnston, Legal Branch, Office of the Director of Matériel, Army Services, upon "Termination of War Contracts." This closed the symposium on War Contracts.

During the remainder of the afternoon session on the first day, Sylvester C. Smith, Jr., chairman of the Association's Committee on Administrative Law, addressed the meeting, dealing with "Improving the Administration of Justice in the Administrative Process."

On the evening of the first day,

William Logan Martin of Birmingham presided at a dinner for those attending the regional meeting and their ladies.

The first speaker was James P. Economos, chairman of the Junior Bar Conference of the American Bar Association, who presented the Award of Merit to the Junior Bar Section of the Alabama State Bar Association for outstanding achievements in Junior Bar activities during the past year. It was accepted on behalf of the Junior Bar Section by its chairman, Robert Gwin.

Rear Admiral Thomas N. Gatch, The Judge Advocate General of the United States Navy, then delivered an address. He chose as his subject, "Total War—Total Peace." The Admiral will ever be remembered by a grateful people for his gallant exploits as Captain of the Battleship *South Dakota* of undying renown.

The dinner meeting closed with an address by President Henderson, in which he recounted many interesting incidents of his three years of work on Military Legal Assistance.

On the morning of the second day the consideration of Administrative Law was continued. There were addresses by John Byrne Chamberlain, associate general counsel, National War Labor Board, and Alvin G. Biscoe, Regional Wage Stabilization Director at Atlanta, upon "Wage Stabilization Procedures before the War Labor Board."

"Practice and Procedures of the Department of Agriculture" were dealt with in an address by Linton B. West, Regional Attorney, Department of Agriculture.

The last speaker at the morning session was Frank E. Spain, chairman of the Association's Section of Insurance Law, and his subject was "Problems of Interest to the Section of Insurance Law."

The noon hour was occupied with a general luncheon — without speeches!

At two o'clock President Hender-

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# AMERICAN BAR ASSOCIATION JOURNAL

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## The Association's Remedial Suggestions Are Specific

IN keeping with the Association's long tradition of making specific its recommendations for improvements in the administration of justice, the Association submits now its concrete proposals "for a fair administrative procedure" by federal agencies. The Association does not stop with pointing out what it deems to be abuses which call for remedy; it offers also for public and legislative consideration the particular measures which in its considered judgment will best correct and remove those abuses.

In this process, the Association does not proffer a product which reflects the experience and the judgment of merely a few men, however well-versed and authoritative they are in the particular field of law. To prepare its draft of an Administrative Procedure Act, the Association's Committee on Administrative Law first held sessions of a representative Administrative Law Conference under its auspices. This brought together the spokesmen of widely different angles of approach, experience and point of view. Then the Committee made a draft of a bill, which was placed before the House of Delegates for its scrutiny and action. When this draft had been approved in principle and main outlines by the House on last August 26, it was submitted by the Committee to the many Sections and Committees of the Association which have to deal with some phases of administrative law; also, to the state and various local bar associations, and to experienced practitioners in this field of law.

From this democratic process came many suggestions for the further improvement of the first draft. These were taken into account by the Committee, in making its further revisions during December. The outcome is a perfected draft of a "fair administrative procedure" for the federal agencies. This now is submitted for the scrutiny and suggestions of the profession and the public, and for the

assistance of legislators who wish to deal remedially with the abuses in administrative procedures.

The draft which is printed in full in this issue of the JOURNAL represents no more than a desire on the part of the Association to be of help, to the public and to legislators, who are concerned by the rising tide of popular demand for legislative correction of the abuses of power. The Association has mobilized the judgment and experience of many public-minded lawyers in perfecting this draft. It is not offered as any counsel of perfection or as any *sine qua non* of legislative action. It will have fulfilled its purpose if it is recognized as a well-considered and competently drafted proposal, which is available on its merits to all those who are motivated to take adequate steps to protect persons and property against the arbitrary exercise of power by federal agencies.

## World Justice

THE demand for justice existed long before the establishment of courts. The judicial tribunals came because justice was recognized as one of the inalienable rights of all men.

There never was a time when the taking by force of some coveted possession of a weaker person was not intuitively resented and instantly resisted. When the taking was accompanied by killing the helpless owner, theft became murder. Those two are the oldest and most hated of crimes. They can never be condoned. They must always be resisted to the end.

Before there was any written code of laws, the punishment for theft embraced as the first element restitution of all stolen property to the owner, and such punishment as should be considered most effective for preventing its repetition. In those ancient days the punishment for willful murder was death.

As primitive man has marched along the path toward civilization, codes of law have been developed applicable to individual theft and murder, but almost no progress has been made for the prevention or punishment of theft or murder when committed by nations.

Failure to follow in the field of World Justice, the course pursued in the field of individual justice has not been due to the inapplicability to nations of the fundamental concepts of justice. No authoritative voice has arisen to deny the universal human belief that justice should rule the conduct of states great and small. The failure has been due to the immensity of the task and to the reluctance of some to surrender the slightest fraction of what we have been pleased to call "Sovereignty."

In 1787 thirteen sovereign states yielded the power to wage war to a new governmental agency, created by them "in order to form a more perfect Union, establish Justice,

insure Domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."

It is too much to hope that the Moscow Accord, the Cairo, and the Teheran Declarations are the beginning of World Justice which shall retake from all marauding nations what they have taken by force from weaker nations and shall restore the stolen provinces to their rightful owners, punish the guilty, provide for the common defense of law-abiding nations and create an enduring peace.

The Cairo Declaration dealt with the theft of a huge fraction of the eastern hemisphere by Japan. The American, British and Chinese governments declare that Japan shall surrender all that enormous loot. To the accomplishment of that great task the three governments pledge their united and continue<sup>1</sup> cooperation.

The Teheran Declaration deals with the Nazi theft. The governments of the United States, Great Britain and Russia have expressed their determination to work together in the war and in the peace that will follow.

They pledge relentless and unceasing war, over the land, from the east, the south, the west; and from the skies and over and under the seas.

They pledge themselves to peace terms which will command the good-will of the overwhelming masses of the peoples of the world and banish the scourge and terror of war for many generations.

They abjure the expectation of any territorial acquisition and assure the distribution of the fruits of victory to those entitled to restitution.

To this end they pledge their cooperation and invite that "of all nations large and small whose peoples in heart and mind are dedicated, as are our own peoples, to the elimination of tyranny and slavery, oppression and intolerance."

The accomplishment of these great aims cannot but make the way ready for World Justice.

## The Conference of Senior Circuit Judges

THE Conference of Senior Circuit Judges continues to demonstrate its usefulness. The press has widely and favorably commented upon the resolution adopted at its last meeting which declares "that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the executive branch of the government by the Hatch Act."

The Conference merits the commendation it has received not only because of the soundness of the view enounced but because of its courage and vision in electing to deal with the subject.

This, however, is not the only instance where it has refused to shirk the responsibility for dealing with troublesome questions by a restricted application of the statute under which it is constituted. In the current report there appears another resolution which suggests standard qualifications for United States Commissioners and urges the appointment of lawyers rather than laymen to these positions.

These two resolutions are merely the most recent instances in the development of a consistent policy.

In 1940 the Conference declared that no circuit or district judge should appoint as law clerk or secretary any person who is related to him within the degree of consanguinity or affinity described in Section 126 of Title 28 of the U. S. Code.

In 1942 federal judges were admonished that it was contrary to the spirit of Canon XIII of the Canon of Ethics of the Association for them to sit in cases in which their near relatives are of counsel.

That there is no statutory method of enforcing these declarations has not rendered them ineffective. In at least one instance a district judge inadvertently failed to follow the pronouncement of the Conference as to nepotism. The resolution was called to his attention and the situation quickly remedied.

In the future the Conference will no doubt deal with other subjects within this field. Among these presumably will be the administration of the offices of the clerks of the district courts.

Most of these clerks are courteous, efficient and hard-working officials. There are a few, however, who consider their offices as sinecures. There is reason to believe that there have been instances when this was at least tacitly understood by both judge and clerk when the appointment was made.

A confidential investigation, made by the Administrative Office by direction of the Conference, would reveal the extent to which such a condition exists. The investigation should not be confined to conferences with the officials concerned nor even to observation of the functioning of the office. It should be supplemented by inquiries of responsible lawyers practicing in the particular court. The situation is always well known to and frequently commented on by the Bar.

That the tenure of the clerk is the will of the district judge is no reason for ignoring an undesirable condition when found to exist. If the report discloses that a competent clerk neglects his duties a reminder from the Conference to the district judge and an admonition by the judge would usually be sufficient.

In cases of recalcitrancy or incompetency on the part of a clerk there is no reason why the Conference should not suggest his removal. Few district judges would ignore such a suggestion from this source.

### The Long Look Ahead

IN an economy and society based on the individual life and the adventures of free enterprise, the turn of the year is the traditional time for the taking of stock and for the look ahead. Subject to whatever vicissitudes befall printing under wartime conditions, the January JOURNAL will come to the desks of its readers at a time when this useful habit of mind still holds sway.

This issue will be read in many perplexed and disrupted law offices and in many anxious homes. Happily none of the law offices of America has been subjected to any such physical destruction as has been visited upon those of our brethren in England, nor to any such stark tragedies as befell the courageous lawyers of Belgium and Holland, France, Italy, and other lands, including our own Philippines, and made their enchanting countryside a flaming terror.

Here the dislocations and desolations have been poignantly of the spirit, the anxieties for loved ones, the distress that things dearer than life are in danger, the feeling of frustration and futility that one can do so little in a great hour, the loss of certainty and security, the emergence of new and grave perplexities which baffle men and minds accustomed to well-charted courses of counsel and action. From the vital younger men who lately bore the burdens of our law offices now come censored envelopes dispatched in faraway places where they face deadly foes. Those left behind, especially the seniors, have had to take up again the treadmill of tasks and routines which they had never expected to resume. In an increasing number of American communities, a gold star on a service flag of church or lodge or office, or on a roster of honor, signifies that a respected lawyer has made the great sacrifice and will not come again to his home, his office, and his friends.

It has become a disconcerting world, to the older men, perhaps to many of the younger men. Distances disappear; people and problems which we long thought remote now loom large as though on our own doorstep. It hardly seems possible that, five years ago, the then Prime Minister of England spoke of "a quarrel in a faraway country, between people of whom we know nothing," and meant Czecho-Slovakia, which is within a few hours by plane from London.

As the year 1943 neared its end, Americans were reminded that this war has lasted longer than did World War I, and that the decisive struggles and the great sacrifices to assure and speed the victory are still ahead. On many continents and many islands of the seas, the men of America are doing all in their power to defeat and destroy the enemy and to end, forever if it can be, the threatened domination of the world by force, caprice, cruelty, and submergence of the dignity of the individual and the rights of man. This is an issue as old as the long struggle for liberty and opportunity, and for status which, several

centuries ago, was even then characterized as the "ancient rights" of mankind.

Is it too much to hope and strive for, that in this year 1944 there may be wrought and achieved both a wholehearted national unity in support of winning the war and a militant readiness to accept any sacrifice and do any amount of hard work which will fortify and preserve the essential things for which America fights? The beginning of this epoch-marking year is a good time to think through, and take stock of, the essential things which were menaced by the war before America went into it, and are still at stake in it, and will still be jeopardized by neo-philosophies prevalent, in other countries and in this one, even after the Axis nations are decisively defeated.

In December the anniversary of the taking effect of the first ten amendments to the Constitution of the United States was hardly heeded as it should have been by the Nation at war, because the Bill of Rights wrote into the law of this land "the great rights of mankind," which have been flaunted and despised by our foes in this war, and may be more insidiously menaced by alien concepts of majority supremacy over individual rights, when peace comes and in the more imminent tasks of preparing for the peace.

*Fortune* magazine recently published a supplement on "Our Form of Government," wherein it was objectively said:

There is today a great new burst of political philosophizing, greater than at any time since the eighteenth century. The eighteenth century's conclusions about government are no longer taken for granted; the "acids of modernity" have eaten them away. Modern man no longer accepts the absolute of "natural rights"; his philosophizing persuades him that he conferred these rights on himself and can, therefore, take them back.

To whatever extent this observation is well-founded, it presents a more subtle, but more serious and startling, danger to free institutions than the armed forces of the Axis have yet meant to America. If the individual citizen has no rights which the rapacity of majorities or organized minorities is bound to respect, and if they can take away and "take back" his historic rights without his consent, then America is truly moving far away from the concept stated in the *Federalist* papers:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part.

Three well-known writers, in a recent supplement to the *New Republic* as to "America in the Post-War World," analyzed what they called "the unfulfilled revolutions" which are developing in Western Europe, and regretted America's still "laggard" attitude toward them. "The main elements are liberal and democratic," they said, "and they move toward state socialism by evolutionary means, with strong attention to civil rights and the freedom of the individual."

Unless the long history of the blood-stained struggle, in England and America, for the "great rights of mankind," is obsolete and fallacious in its warnings, no more unfounded opportunism could be held out to Americans in this critical year of war. There is much in these matters which should startle the masses at their meals. Relaxing or removing the time-honored and tested limitations on the authority of majorities to disregard and override the rights of minorities and individuals, as is implicit in state socialism and the repudiation of "natural rights," leaves no sound and secure basis of lasting protection for civil liberties or individual freedom, no matter how much pretense is made of majority solicitude during intermediate stages.

In resisting the inroads of arbitrary power, whether in governmental hands or in private hands aided by government, there is much for American lawyers to do, in this year and the years ahead. The story is told that when Seargent S. Prentiss closed his classic "defense of his friend," and fell ill, an admirer cried out: "Die, Prentiss, die; you will never have a more glorious opportunity." The individual American lawyer never had a "more glorious opportunity" than now to live, work, sacrifice leisure,

risk health, put forth every effort, for things which are vital and should be enduring. If they do all this, and do it to the utmost of their time and strength, they will still fall short of the courageous spirit of the manifesto sent in 1943, at risk of their lives, by the lawyers who constitute the Belgian Supreme Court of Appeals, to the Nazi occupation authorities, in language which breathes the unshakable will of bold judges and independent lawyers everywhere:

Placed at the apex of the judiciary hierarchy, representing the highest authority in occupied territory, the only constituted national body whose action cannot be paralyzed, the Belgian Supreme Court of Appeals owes it to itself and to the nation solemnly to denounce the injustice and the wrong which is thus reserved for the Belgians, and to recall the fact that these measures are in opposition, not only to the dispositions of The Hague Convention signed by Germany and Belgium, but also to the imperious demands of conscience.

So long as judges and lawyers speak thus boldly their resistance to arbitrary power which would take away or belittle the "great rights" that give dignity and vouchsafe opportunity to human beings, the long look ahead, at the turn of the year, should leave no lawyer with a feeling that he lacks worth-while work to do, for his profession and his country.

## British Fair Play

THE enduring substance of the British tradition for fair play according to traditional law and irrespective of political or social philosophies was trenchantly reflected in the statement issued through the Overseas Agency on December 8, 1943, by Professor Harold Laski, noted internationalist and exponent of "radical" views of the British Labor Party, concerning the release of Sir Oswald Mosley, leader of the Fascist "right-wing totalitarians" in England.

For Mosley and his record, Professor Laski proclaimed that his own feelings were only "those of loathing and disgust." Yet he defended stoutly the action of Home Secretary Morrison in releasing him from the prison. In justification, Professor Laski pointed out that Mosley had been interned under the administrative regulation which gave a power of internment without trial, under stress of the very great emergency which existed in England in 1940. "Even then, with invasion imminent," declared Professor Laski, "it was only with difficulty that Parliament was persuaded to give the Home Secretary the right to suspend all normal methods of justice which had been worked out over centuries.

"It is worth noting that the National Council of Civil Liberties protested then against this power, although some of its prominent members now are among Morrison's critics, and when one of its members was detained under the rule the protests of the Communist Party were tremendous.

"Morrison answers his critics that he can now do safely, under stringent precautions in 1943, what he could not safely have done in 1940; he has taken all precautions that public security requires. Second, the basis of the conditional release, a medical report, was confirmed by three eminent doctors.

"Third, however detestable his opinions, Mosley was not convicted of any offense and his detention was an act of public security for which Parliament deliberately entrusted the Home Secretary with the responsible application. It can only mean that Morrison must act as judicially as he can in such a case."

Friends of law-governed liberty everywhere will applaud Professor Laski's declaration that "I hope we are not fighting Hitler to transform ourselves into a nation which accepts either his standards or his procedure of justice.

"If Mosley is guilty of a breach of the law he can be brought to trial. If he has been so guilty, nothing but public security justifies imprisonment. Of that security Morrison is the judge."

Of far wider application and import than the Mosley case in England is the concluding paragraph of Professor Laski's defense of the action of the Home Secretary in terminating Mosley's incarceration without trial.

"The less injury we do by giving way to the clamor for 'executive justice' in times of crisis, the more likely we are, after victory, to restore respect for the principle of rule by law on which all freedom depends."

# REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN\*

## Criminal Law—Guilt Without Intent—Immunity

The Federal Food, Drug, and Cosmetics Act, 1938, prohibits "the introduction into interstate commerce of any drug . . . that is adulterated or misbranded" and makes "any person" who violates that prohibition guilty of a misdemeanor.

The word "person" here includes a corporation and the officers through whose conduct the prohibited act is accomplished, even though the officers were not guilty of conscious wrong.

To soften the rigors of the statute, immunity from prosecution is given to those shippers who procure from the seller a guaranty that the product was not adulterated or misbranded.

*U. S. v. Dotterweich*, 88 L. ed. Adv. Ops. 74; 64 Sup. Ct. Rep. 134; U. S. Law Week 4033. (No. 5, argued October 12, 1943, decided November 22, 1943.)

Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, were prosecuted by informations charging violation of the Federal Food, Drug, and Cosmetic Act of June, 1938. The company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. The informations were based on Section 301 of that Act, paragraph (a) of which prohibits "The introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded". "Any person" violating this provision is made guilty of a misdemeanor. The jury disagreed as to the corporation and found Dotterweich guilty. The circuit court found that the evidence was adequate to support the verdict of adulteration and misbranding.

That court, one judge dissenting, reversed the conviction on the ground that only the corporation was the "person" subject to prosecution. The case was brought to the Supreme Court on the government's petition for certiorari.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER. He makes short shrift of two preliminary questions. The statute requires the Administrator, before reporting a violation for prosecution, to give the accused an "opportunity to present his views." Citing prior decisions, it was held that the giving of such an opportunity is not a prerequisite to prosecution. The second point was that, having failed to find the corporation guilty, the jury could not find its president and general manager guilty.

Of the verdict, Mr. Justice FRANKFURTER says:

. . . Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

\*Assisted by JAMES L. HOMIRE.

To mitigate the severity of the Act, immunity was granted under certain conditions if the shipper secured from the seller a guaranty of the innocence of the product. The opinion sets out the relevant provisions of this clause as follows:

No person shall be subject to the penalties of subsection (a) of this section . . . (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act . . .

The circuit court found it "difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one." Of this, Mr. JUSTICE FRANKFURTER says:

The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. . . . The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

Coming to the interpretation of the term "any person", Mr. Justice FRANKFURTER says:

The statute makes "any person" who violates § 301 (a) guilty of a "misdemeanor". It specifically defines "person" to include "corporation". § 201 (e). But the only way in which a corporation can act is through the individuals who act on its behalf. . . . And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty. . . . a doctrine given general application in § 332 of the Penal Code. . . . If, then, Dotterweich is not subject to the Act, it must be solely on the ground that individuals are immune when the "person" who violates § 301 (a) is a corporation, although from the point of view of action the individuals are the corporation.

The development of the Federal Food and Drug

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legislation was traced and discussed, and Mr. Justice FRANKFURTER says:

... To hold that the Act of 1938 freed all individuals, except when proprietors, from the culpability under which the earlier legislation had placed them is to defeat the very object of the new Act. Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it.

The legislative history of the various Acts, the reports of the Congressional committees, and the prior decisions of the Supreme Court were considered, and the opinion declares:

The Act is concerned not with the proprietary relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. If a guaranty immunizes shipments of course it immunizes all involved in the shipment. But simply because if there had been a guaranty it would have been received by the proprietor, whether corporate or individual, as a safeguard for the enterprise, the want of a guaranty does not cut down the scope of responsibility of all who are concerned with transactions forbidden by § 301. ... To read the guaranty section, as did the court below, so as to restrict liability for penalties to the only person who normally would receive a guaranty—the proprietor—disregards the admonition that "the meaning of a sentence is to be felt rather than to be proved".

Commenting again upon the view of the lower court, Mr. Justice FRANKFURTER says:

The circuit court of appeals was evidently tempted to make such a devitalizing use of the guaranty provision, through fear that an enforcement of § 301 (a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment. But that is not the way to read legislation. Literalism and evisceration are equally to be avoided. To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. ... Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

The opinion closes with the following paragraph:

... For present purposes it suffices to say that in what the defense characterized as "a very fair charge" the district court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Mr. Justice MURPHY filed a dissenting opinion. He declares that the principal concern in the case is whether the statute plainly and unmistakably applies to the defendant in his capacity of a corporate officer. He asserts that there is no evidence of any personal guilt on the part of the corporation's president, nor any proof of guilty knowledge, and that guilt is imputed to him

on the basis of his responsibility as president and general manager of the corporation. From this premise he proceeds to the consideration of the law which controls in such cases and says:

It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge.

It is next asserted that, although the policy and purpose of a public health and welfare measure is involved, the importance of that policy does not authorize the Court to impose liability where Congress has not clearly intended or actually done so. Pursuing this subject, Mr. Justice MURPHY says:

Looking at the language actually used in this statute, we find a complete absence of any reference to corporate officers. There is merely a provision in § 303 (a) to the effect that "any person" inadvertently violating § 301 (a) shall be guilty of a misdemeanor. Section 201 (e) further defines "person" as including an "individual, partnership, corporation, and association." The fact that a corporate officer is both a "person" and an "individual" is not indicative of an intent to place vicarious liability on the officer. Such words must be read in light of their statutory environment. Only if Congress has otherwise specified an intent to place corporate officers within the ambit of the Act can they be said to be embraced within the meaning of the words "person" or "individual" as here used.

Attention was called to the provisions of Sec. 2 of the Act, and of that section Mr. Justice MURPHY says:

Section 2 of the Federal Food and Drugs Act of 1906, as introduced and passed in the Senate, contained a provision to the effect that any violation of the Act by a corporation should be deemed to be the act of the officer responsible therefor and that such officer might be punished as though it were his personal act. This clear imposition of criminal responsibility on corporate officers, however, was not carried over into the statute as finally enacted. In its place appeared merely the provision that "when construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation ... within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation ... as well as that of the person." This provision had the effect only of making corporations responsible for the illegal acts of their officers and proved unnecessary in view of the clarity of the law to that effect.

Fortifying his argument by a comparison of the language of successive amendments of the Act, the insertion and subsequent deletion of provisions as to criminal liability, Mr. Justice MURPHY says:

The dangers inherent in any attempt to create liability without express Congressional intention or authorization are illustrated by this case. Without any legislative guides, we are confronted with the problem of determining precisely which officers, employees and agents of a corporation

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are to be subject to this Act by our fiat. . . . The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law. I therefore cannot approve the decision of the Court in this case.

Mr. Justice ROBERTS, Mr. Justice REED and Mr. Justice RUTLEDGE join in this dissent.

The case was argued by Mr. Solicitor General Fahy for the government and by Mr. Samuel M. Fleischman for Dotterweich.

### Criminal Law—Probation—Revocation—Increase of Original Sentence

After conviction, one sentenced to imprisonment, and released on probation, may not after revocation of probation be re-sentenced to serve a longer term of imprisonment.

*Roberts v. U. S.*, 88 L. ed. Adv. Ops. 68; 64 Sup. Ct. Rep. 113; U. S. Law Week 4037. (No. 19, argued October 15 and 18, 1943, decided November 22, 1943.)

In April 1938, an accused pleaded guilty and was sentenced to pay a fine of \$250 and to serve two years in a federal penitentiary. The court suspended execution of the sentence, conditioned on payment of the fine, and ordered release on probation for a five year period.

In June 1942, after a hearing, the court revoked the probation, set aside the original sentence of two years, and imposed a new sentence of three years.

The court of appeals affirmed. The Supreme Court granted certiorari and reversed the judgments.

The opinion of the Court was delivered by Mr. Justice BLACK. After summarizing the record and the points raised, he says:

... In the instant case that part of the original judgment which suspended execution of the two year sentence and released the petitioner on probation was authorized by the literal language of Section 1 of the Probation Act (U. S. C. Title 18, § 724) granting the district court power "to suspend the . . . execution of sentence and to place the defendant upon probation. . . ." But before we can conclude that the Act authorized the district court thereafter to increase the sentence imposed by the original judgment we must find in it a legislative grant of authority to do four things: revoke probation; revoke suspension of execution of the original sentence; set aside the original sentence; and enter a new judgment for a longer imprisonment.

For the power to do what was done by the district judge, the government relied on a statute which provided:

At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. 43 Stat. 1260.

As to the authority granted by this provision, Mr. Justice BLACK says:

... It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by Section 2. It is equally clear that power to do the third, set aside the original sentence, is not expressly granted. If we find this power we must resort to inference.

In coming to the final solution of the problems involved, the legislative history of the various Acts dealing with the subject of probation, beginning with that of 1917, the numerous Congressional committee reports, the reports of the Attorneys General, and the decisions of the federal courts in adjudicated cases, were examined and Mr. Justice BLACK states the final conclusion reached by the majority as follows:

\* To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by a prior valid sentence gives full meaning and effect both to the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns v. United States*, 287 U. S. 216. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender. All we now hold is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment.

Mr. Justice FRANKFURTER delivered a dissenting opinion, in which the CHIEF JUSTICE and Mr. Justice REED concurred.

The opening paragraph of the opinion deals with the origin and objectives of this penological device. It is said:

... Probation is an experimental device serving both the offender and society. It adds the means for exercising wisely that discretion which, within appropriate limits, is given to courts. The probation system was devised to allow persons guilty of anti-social conduct to continue at large but under appropriate safeguards. The hope of the system is that the probationer will derive encouragement and collaboration in his endeavors to remain in society and never serve a day in prison. . . . Since assessment of an appropriate punishment immediately upon conviction becomes very largely a judgment based on speculation, the function of probation is to supplant such speculative judgment by judgment based on experience.

In answer to the position of the majority that there was no explicit provision of the statute authorizing the court to "set aside the original sentence and enter a new judgment for a longer sentence," the thesis of the dissent was that the power to do both of those things

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is fully embraced in the Act by necessary implication. On this point of the debate Mr. Justice FRANKFURTER says:

In view of all that led to the adoption of probation and the light its workings have cast, the imposition of a suspended term sentence is meaningless if indeed it does not contradict the central idea underlying probation. A convicted person who is given a term sentence and then placed on probation hopes never to spend a day in prison. The court returning the probationer to the community likewise assumes that the influence of probation will save the probationer from future imprisonment. To treat the pronouncement of a term sentence as a kind of bargain whereby the probationer knows that, no matter what, he cannot be put in prison beyond the term so named is to give a wholly unreal interpretation to the procedure. We certainly should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the philosophy of probation. . . . The fact is that term sentences of which the execution is suspended are likely to be as full of vagaries and as unrelated to insight relevant to treatment for particular individuals, as are term sentences the execution of which is not suspended. The capricious nature of such defined sentences dominates all statistical and other evidence regarding conventional judicial sentencing, . . . and has led to suggestions for more specific methods of sentencing. . . .

If the experience of the District Court for the Southern District of New York—the district having the heaviest volume of federal criminal prosecutions—is a fair guide, the imposition of sentence is more frequently suspended than is its execution. The only practical result of the strained reading of the powers of the district courts by the decision today may well lead trial judges generally to place probationers on probation without any tentative sentence. A construction which leads to such a merely formal result, one so easily defeated in practice, should be avoided unless the purpose, the text and the legislative history of the Act converge toward it.

Citing the report of the House Committee on Judiciary in support of an interpretation of this Act, the dissenting opinion says:

. . . In reporting the present legislation to the House of Representatives, its Committee on the Judiciary explained that "In case of failure to observe these conditions [of probation], those on probation may be returned to the court for sentence." H. Report No. 1377, 68th Cong., 2d Sess., 2.

And the text of the legislation does not defeat this policy. Indubitably petitioner was arrested and brought before the court during his period of probation. In that event the statute is explicit in its direction that "the court may revoke the probation . . . and may impose any sentence which might originally have been imposed." . . . We cannot say that the statute does not contemplate that the new sentence which it authorizes shall be effective. The obvious purpose is that it should become so either by superseding any sentence earlier imposed or by revoking the suspension of imposition of sentence if none was imposed. . . . suspension whether of the sentence or of its execution leaves a trial court free to commit the criminal to prison if he fails to meet the test of freedom during the probationary period. To meet an implication that the course pursued was

unconstitutional, Mr. Justice FRANKFURTER says:

. . . But to set a man at large after conviction on condition of his good behavior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice. If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder.

The case was argued by Mr. Newton B. Powell for Roberts and by Mr. Paul A. Freund for the government.

### Water Rights—Rights of States in Water of Streams Flowing from One State to Another

In a suit brought by one state against another to determine their respective rights in the waters of a stream flowing from one state into the other, the dispute must be adjusted on the basis of equality of rights to secure the benefits of irrigation to one without depriving the other of the benefits of a flowing stream. The measure of reciprocal rights and obligations of the states is an equitable apportionment of the benefits of the stream.

The Court will exercise judicial caution in adjudicating relative rights of states in disputes of this character involving the interests of quasi-sovereign states and complicated and delicate questions, and involving the possibility of future changes of conditions which necessitate expert administration rather than the imposition of a hard and fast rule.

In suits of this character the complainant state has a much greater burden of proof than that generally imposed upon private litigants in suits in equity.

*The State of Colorado v. The State of Kansas, et al.*, 88 L. ed. Adv. Ops. —; 64 Sup. Ct. Rep. 176; U. S. Law Week 4046. (No. 5, argued October 11 and 12, 1943, decided December 6, 1943).

This is a suit brought in the Supreme Court under its original jurisdiction by Colorado, or her citizens, against Kansas, or her citizens, to enjoin the prosecution of certain pending litigation by a Kansas Water Users' Association and to restrain Kansas and her citizens from litigation concerning the relative rights of the two states and their citizens in the waters of the Arkansas River. The suit also sought protection of the rights of Colorado and her citizens in the waters under the Court's earlier judgment in *Kansas v. Colorado*, 206 U. S. 46.

The opinion of the Court, delivered by Mr. Justice ROBERTS, summarizes the pleadings. The Court, in *Kansas v. Colorado*, had ruled that Kansas was not entitled to have the stream flow as it had flowed in its natural state; that Colorado was not entitled to dispose of all the water within her borders; that each state had equality of rights and that their dispute was to be adjusted to secure, so far as possible, to Colorado the benefits of irrigation, without depriving Kansas of the benefits of a flowing stream. The measure of reciprocal rights and obligations was held to be an equitable apportionment of the benefits of the river. Furthermore, it was ruled that, before irrigation developments in Colorado were to be destroyed or materially affected, Kansas must show not merely a technical right but one which carries corresponding benefits. Kansas' bill was dismissed, on the proofs, but without prejudice to future action.

In the present suit the two questions passed on by the

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Court are: (1) Does the situation call for allocation of waters of the river basin as between the two states in second feet or acre feet; (2) has Kansas proved that Colorado has substantially and injuriously aggravated conditions which existed at the time of the earlier suit.

Answering the first question in the negative, Mr. Justice ROBERTS says:

Colorado urges that our decision in *Kansas v. Colorado*, *supra*, amounted to an allocation of the flow of the Arkansas River between the two states. We cannot accept this view. In that case Kansas labored under a burden of proof applicable in litigation between quasi-sovereign states, of which more hereafter. The dismissal of her bill resulted from the conclusion that she had failed to sustain the burden. But from the decision then rendered it follows that unless Kansas can show a present situation materially different from that disclosed in the earlier case she cannot now obtain relief.

The prayer of Kansas for an apportionment in second feet or acre feet cannot be granted. In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not then appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her substantial interests. This was in accord with other decisions in similar controversies.

The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

It follows that the Master erred in attempting to divide what he designated as the "average annual dependable" water supply of the Arkansas River in Colorado into fractions and awarding those fractions to the states respectively. Such a controversy as is here presented is not to be determined as if it were one between two private riparian proprietors or appropriators.

The lower state is not entitled to have the stream flow as it would in nature regardless of need or use. If, then, the upper state is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both states, is whether, and to what extent, her action injures the lower state and her citizens by depriving them of a like, or an equally valuable, beneficial use.

In discussing the second question (as to whether Kansas had met its burden of proof) emphasis is placed upon the great caution with which the inquiry must be approached, because,

Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the Court will intervene the case must be of serious magnitude and fully and

clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

As to the merits, it is stressed that a decree against Colorado, such as proposed by the Master allocating specific amounts of the flowage to Colorado and specific amounts to Kansas, would inflict serious damage on agricultural developments in Colorado. The Court says:

... How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge.

The controversy was litigated in 1901. Kansas was denied relief in 1907. The dispute between appropriators in the two states was brought into court in 1910 and settled in 1916. The Finney County Association sued Colorado appropriators in 1916 and 1923. Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.

These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case.

The remaining part of the opinion contains an analysis of the evidence, from which it is concluded that Kansas failed to sustain her allegations that Colorado's use of the water has materially increased and that the increase had worked a serious detriment to the substantial interests of Kansas.

The case was argued by Mr. Gail L. Ireland and Mr. Jean S. Breitenstein and Mr. Henry C. Vidal for Colorado and by Mr. W. E. Stanley and Mr. Eldon Wallingford for Kansas.

### Motor Carriers Act of 1935—Commission's Power to Limit Certificate Under Grandfather Clause

Under Section 208 of the Motor Carrier Act of 1935, the Interstate Commerce Commission, in granting a certificate of public convenience and necessity under the Grandfather Clause, may limit the operation to the general type of vehicles in use prior to the critical date, June 1, 1935.

*Crescent Express Lines, Inc., v. The United States of America, et al.*, 88 L. ed. Adv. Ops. —; 64 Sup. Ct. Rep. 167; U. S. Law Week 4044. (No. 65, argued November 19, 1943, decided December 6, 1943).

On this appeal the Supreme Court, in an opinion by Mr. Justice REED, affirms the judgment of the district court upholding an order of the Interstate Commerce

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Commission limiting a certificate authorizing the Crescent Express Lines to operate as a common carrier by motor vehicle. Crescent is the successor of a carrier entitled to a certificate to operate under the "grandfather clause" of the Motor Carrier Act of 1935, 49 U.S.C. § 306(a). In 1938 the Commission issued an order granting a certificate of considerably broader scope than that under attack here. Protests were filed to that order on the ground that it was too broad. In 1941 the present order of more limited scope was issued. It limits Crescent to service in which not more than six passengers, exclusive of driver, are carried in any one vehicle; limits it to special operations in non-scheduled door-to-door service; and limits it to operation over irregular routes between points in New York City and points in Sullivan and Ulster Counties, New York.

Crescent contests the order on three principal grounds: (1) that there was a lack of proper hearing or evidence to support the revised order; (2) that the record does not support the Commission's restriction of operations to a door-to-door service or irregular routes in the non-scheduled service; and (3) that the limit on the size of the vehicles was not warranted by the statute. All of these contentions were rejected.

The important legal question in the case arises in connection with Crescent's third contention which is based upon the provisions of the statute "That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." Under this provision Crescent claims that it is entitled to use buses or other larger vehicles as the development of its business might require. In rejecting this contention the Court says, in part:

The line between six-passenger and larger scale operation must be drawn somewhere, and the Commission has fixed it where the appellant conducted its business on June 1, 1935. The Crescent partnership gave some indication that it appreciated these special differences when in 1938 it proposed to change its name to Crescent Cadillac Service, "for the sake of a better business name," thus emphasizing the commercial significance of the sedan-type vehicle. It appears from the application that Crescent owned no buses; it operated nothing but sedans. To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation system which it occupied on July 1, 1935.

If the holder of a grandfather certificate for this distinctive door-to-door service could develop his operations so that they would be substantially those of a bus line, the ability of the Commission to carry out its duties of regulation in the public interest would be seriously impaired. Since § 308 requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used. We agree with the Commission that the proviso is a prohibition against a limitation on the addition of more vehicles of the

authorized type not a prohibition of the specification of the type.

We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act. When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing.

The case was argued by Mr. George H. Rosen for the express lines and by Mr. Edward M. Reidy for the United States, and submitted by Mr. Henry P. Goldstein for Mountain Transit Corporation and by Mr. James F. X. O'Brien for the Hudson Transit Lines.

### Interstate Commerce Act—Determination of Just and Reasonable Divisions

Under the Interstate Commerce Act, the Interstate Commerce Commission is empowered to fix just and reasonable divisions between the carriers, subject to the Act, which are parties to joint rates. In determining the fairness of a division, the Commission properly limits its consideration to factors pertinent to each carrier's share of the transportation service performed by it. It is proper to exclude from consideration payments which one carrier makes to an affiliated interest for service which the latter performs after the transportation service covered by the rate has come to an end.

*Interstate Commerce Commission, et al., v. Hoboken Manufacturers' Railroad Company*, 88 L. ed. Adv. Ops. —; 64 Sup. Ct. Rep. 159; U. S. Law Week 4050. (No. 43, argued November 9, 1943, decided December 6, 1943).

On this appeal the Court considers the validity of an order of the Interstate Commerce Commission dismissing a complaint filed by Hoboken Manufacturers' Railroad Company, in which it sought an increase in the divisions which it receives out of joint class and commodity freight rates established by it and various trunk line carriers on traffic interchanged by Hoboken with Seatrain Lines, Inc., a common carrier by water. Seatrain controls Hoboken through ownership of substantially all of the latter's capital stock.

Seatrain operates ocean-going vessels which carry loaded freight cars from Hoboken, New Jersey, to Cuba and Belle Chasse, Louisiana. An overhead crane lifts cradles containing the freight cars into the vessels. By this operation the expense of loading and unloading freight to and from the cars is avoided. The rail carriers have been paying Hoboken a division of 60c per ton on all freight interchanged with Seatrain whether moving on lighterage-free or non-lighterage-free rates. Hoboken now seeks an increase on tonnage moving under lighterage-free rates to \$1.35 per ton, maintaining that it is entitled to compensation by way of increased divisions on account of payments which it makes to Seatrain.

The Commission, while recognizing that Hoboken is entitled to a division based upon the full cost of performance of its share of the transportation service, concluded, nevertheless, that on the record Hoboken had

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not shown that the payments made to Seatrain were a necessary part of the service and that if those payments be excluded, the record warranted the conclusion that Hoboken is adequately compensated by existing divisions.

The district court agreed with the Commission that the payments by Hoboken to Seatrain were not a legitimate transportation cost and that since the Commission's findings were supported by evidence, its ruling was final. That court, however, thought that even though the contract payments should be disregarded, Hoboken might be obligated to pay Seatrain the reasonable value to it of the use of the Seatrain's method of interchange, and that if that use were found to have no value, at least any "windfall" resulting to the rail carriers as a whole should be divided equitably among them. The district court set the order aside, therefore, and directed the Commission to evaluate Seatrain's methods of interchange and their worth to Hoboken, and include in Hoboken's cost the amount of a legitimate payment for their use; and, if it found that they were not of worth to determine whether any "windfall" to the carriers resulted from their use, and to establish an equitable basis for division of the "windfall" among the carriers.

On appeal the district court's ruling was reversed by the Supreme Court in an opinion by Mr. Justice STONE. The opinion notes that Section 15(6) empowers the Commission to determine whether divisions of joint rates are just and reasonable as between parties to the rates and to order just and reasonable divisions.

The opinion points out that the ruling excludes from consideration all questions as to the sufficiency of the divisions except Hoboken's tonnage allowances to Seatrain. The decision is rested on the finding of the Commission, supported by evidence, that the rail carriers' service ends when they place the cars in or take them from Seatrain's cradles.

The Court's view of the question is indicated by the following portion of its opinion:

Here the Commission was concerned with the divisions of joint rail rates which covered the rail carrier service between inland points of rail shipment or destination and the point of interchange at Hoboken. The Commission has found that this point is the Seatrain cradle at shipside, and that the service rendered by Seatrain in loading and unloading the loaded freight cars upon and from its vessels is no part of the rail carrier service with respect to which divisions are here sought. Consequently neither Hoboken nor Seatrain is entitled to compensation out of the joint rail haul charges for the ship loading and unloading service. Since Hoboken is entitled to receive by way of divisions only its just and equitable share of the proceeds of the joint rail transportation service rendered, it cannot claim as a part of its share the costs of a service which is not a part of the rail service called for by the joint rates. Neither the joint rates of the rail carriers nor the rates of Seatrain are here under attack and presumptively they yield adequate but not excessive compensation for the transportation services rendered under them.

From these findings of the Commission, and its further finding that the interchange service rendered by Seatrain is incident to Seatrain's transportation service, it would seem to follow that Seatrain is entitled to compensation for it as such, and presumably is so compensated by its tariffs. If the compensation is inadequate the remedy lies in an increase in Seatrain's rates or in its divisions of joint rail and water transportation rates—for which it has an application pending before the Commission . . . —rather than in its participation, by way of allowances paid to it by Hoboken, in the proceeds of a joint rail service of which it performs no part.

Hence the district court's direction to the Commission to determine what part of the value of the interchange service rendered by Seatrain should "be allowed in establishing Hoboken's legitimate costs," as an "aid to railroad transportation," is inconsistent with its conclusion that the Commission correctly found that the payments by Hoboken to Seatrain "do not constitute a legitimate transportation cost," and that Seatrain's interchange service is no part of the rail transportation. If these findings be sustained, as they must, inquiry whether the payments to Seatrain have induced the performance of an interchange service resulting in savings to the rail carriers is irrelevant to a determination of divisions of the joint rates for the rail service of which the ship loading and unloading service performed by Seatrain is not a part. . . .

Section 15(6), which authorizes the division of joint rates applicable to a transportation service, contemplates only the apportionment of the proceeds of that service among the parties to it and not the compensation of others for a service not covered by the joint rates to be divided. Seatrain is not a party to this proceeding and it is not a necessary party to a proceeding to fix divisions of a joint rail rate—or of a portion of a joint rail-water rate—in which it does not participate. . . . We are accordingly not concerned with the adequacy of Seatrain's tariffs to compensate for its ship loading and unloading service or with the lawfulness of the payments to it by Hoboken. A determination by the Commission of the extent of the saving to the rail carriers attributable to Hoboken's payments to Seatrain was therefore not prerequisite to its order prescribing divisions. And its order is adequately supported by its findings that the rail transportation service begins and ends with the placing of the cars in Seatrain's cradles, and that the ship loading and unloading service forms no part of the rail transportation.

The case was argued by Mr. Edward M. Reidy for ICC and by Mr. Willis T. Pierson and Mr. Parker McCollister for the railroads.

### Interstate Commerce Act—Actions to Recover Freight Charges—Limitations

*Mid State Horticultural Co., Inc. v. The Pennsylvania Railroad*, 88 L. ed. Adv. Ops. 83; 64 Sup. Ct. Rep. 128; U. S. Law Week 4017. (No. 40, argued October 21 and 22, 1943, decided November 22, 1943).

Certiorari to review a judgment of the Supreme Court of California in favor of the Railroad in its action to recover freight charges on shipment of grapes. Shortly before the expiration of the three-year period within which actions shall be brought, under Section 16 (3)

(a) of the Interstate Commerce Act, the shipper, by express agreement, in consideration of the carriers' undertaking not to sue for a certain period, undertook not to "plead in any such suit the defense of any general or special statute of limitations." The shipper finally refused to pay, and the carrier sued to recover its charges. The shipper interposed a defense based on the statute of limitations, notwithstanding its agreement to the contrary.

In an opinion by Mr. Justice RUTLEDGE the Supreme Court reverses the judgment and sustains the shipper's defense. In reaching this conclusion the Court emphasizes the statutory purpose of fostering the principle of uniformity in actions between carriers and shippers and that the great weight of decisions, including those of the Supreme Court, indicates that the lapse of the statutory period "not only bars the remedy but destroys the liability."

The case was argued by Mr. Theo. J. Roche for the horticultural company and by Mr. John Dickinson for the railroad.

#### Railway Labor Act—Jurisdiction of Federal Courts to Adjudicate Disputes as to Collective Bargaining Representation

The federal courts have no jurisdiction, under the Railway Labor Act, to adjudicate disputes between unions as to which union is the lawful collective bargaining representative of a craft. Jurisdictional disputes are, left, under the terms of the Act, for determination by the administrative agency designated by law for that purpose.

*Switchmen's Union of North America v. National Mediation Board*, 88 L. ed. Adv. Ops. 89; 64 Sup. Ct. Rep. 95; U. S. Law Week 4022. (No. 48, argued October 15, 1943, decided November 22, 1943).

The Switchmen's Union and some of its members brought suit against the National Mediation Board, the Brotherhood of Railroad Trainmen, the Michigan Central Railroad and the New York Central Railroad. The Brotherhood claimed to be the representative of all the yardmen on the New York Central system for purposes of collective bargaining and the Mediation Board upheld that contention, and certified that the Brotherhood was the collective bargaining representative of all the yardmen. The Switchmen, however, contended unsuccessfully before the Board that the yardmen of certain designated parts of the system should be permitted to vote for separate representation and not be compelled to participate in a systemwide election. The Switchmen sought to have the determination of participants and the certification of the representatives cancelled by the district court; but it sustained the Board and the circuit court of appeals affirmed by divided bench.

On certiorari the Supreme Court reversed in an opinion by Mr. Justice DOUGLAS. In deciding the case, the Court does not reach the merits because it was of the opinion that the district court was without power to

review the Board's action in issuing the certificate. The broad grant of general jurisdiction to the federal district courts under §24(8) of the Judicial Code is assumed to be sufficient to adjudicate the question except for the fact that the special circumstances obtaining here prevent that jurisdiction from being invoked. Section 2, Ninth, under which the Board's certification is issued provides that in a dispute which arises among the employees as to who are their representatives, it shall be the duty of the Board upon request of either party to investigate the dispute and certify in writing the designated and authorized representative and thereupon the carrier shall treat with the representative so certified as the representative of the craft or class.

Upon an examination of the statute and its history, the majority of the Court conclude that it was the intent of Congress to leave final determination of controversy of the character here involved to the Mediation Board. In this connection the opinion states:

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purpose of the decisions of this Court in *Texas & N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548 and *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth, writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for the purposes of this Act." That "right" is protected by § 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. . . . A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right." Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another.

Mr. Justice REED delivered a dissenting opinion in which he states his reasons for the view that the administrative order of the Mediation Board is subject to judicial review under § 24(8) of the Judicial Code. He says, in part:

Nothing to which our attention has been called appears in the legislative history indicating a determination of Congress to exclude the courts from their customary power

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to interpret the laws of the nation in cases or controversies arising from administrative violations of statutory standards. No intention to refuse judicial aid in administration of the Act is apparent. Attention was called just above to the criminal sanctions written into Section 2, Tenth. In addition provision is made in the Act for judicial review of the orders of the National Railroad Adjustment Board, Section 3, First (p), and board of arbitration awards, Section 9, Third. Furthermore, the National Mediation Board has appeared in many court cases, as here, involving its certifications and so far as appears neither the parties nor the courts have questioned judicial power. The Board feels that such review has been profitable. Against these later facts, the earlier reliance, prior to 1926, on voluntary action to enforce the railway labor statutes has little significance.

Nor in view of the statements and the decision in the *Clerks* case, do we think that the omission of statutory review from the provisions of Section 2, Ninth, is important. The requirement of that very subsection that "the carrier shall treat with the representatives so certified" was construed as an affirmative command open to judicial enforcement without specific statutory authority.

Mr. Justice ROBERTS and Mr. Justice JACKSON joined in the dissent. Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the decision.

The case was argued by Mr. Donald R. Richberg for the Union of Switchmen, by Mr. Robert L. Stern for the NMB and by Mr. Bernard M. Savage for the Brotherhood of Railroad Trainmen.

*General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad, an Unincorporated Association, v. Missouri-Kansas-Texas Railroad Company, et al.*, 88 L. ed. Adv. Ops. 104; 64 Sup. Ct. Rep. 146; U. S. Law Week 4028. (No. 23, argued October 14, 1943, decided November 22, 1943).

This case arose out of a dispute under the Railway Labor Act concerning the authority of the Brotherhood of Locomotive Engineers and the authority of the Brotherhood of Locomotive Firemen and Enginemen to represent certain employees in collective bargaining with the Railroad Companies, employers. Under agreements in force, regulations were made covering the promotion of firemen to be engineers when vacancies occurred and the demotion of engineers to positions as firemen when reduction in work decreased the number of engineer's positions necessary to be filled. The arrangements were not satisfactory to the Firemen and they took their grievance to the Mediation Board. There, proceedings were held in which the Engineers did not participate. The Firemen and the railroads then made an agreement dated December 12, 1940, changing the arrangements theretofore in force. The Engineers then brought an action for a declaratory judgment asserting that they were the sole representatives of the Locomotive Engineers with the exclusive right to bargain for them. The railroads prayed that the court declare the rights of the parties, and the Firemen, though challenging the jurisdiction of the Court prayed in the alternative that the

agreement of December 12, 1940, be declared valid. The district court dismissed the petition, ruling that the carriers had a right to contract with either of the crafts as to the problems in question. The circuit court of appeals held both crafts interested in the subject-matter of the dispute, that neither had exclusive bargaining rights touching the question, that the representatives of both crafts should confer and, if possible agree, and, finally, that the agreement of 1940 might be terminated by the carriers if the Engineers did not acquiesce in it.

On certiorari the Supreme Court reverses the judgment in an opinion by Mr. Justice DOUGLAS. The Court concludes, upon a review of the statutory history of the Railway Labor Act, that the parties are foreclosed from resort to the courts for the enforcement of their claims. It is pointed out that the present Act is the product of fifty years of evolution during which Congress has evidenced its intention to leave large segments of the field of railway labor to the voluntary processes of conciliation, mediation, and arbitration; to place some in the hands of administrative agencies; and finally, to entrust only certain segments of the field to the compulsion of law enforceable by judicial machinery.

In exposition of the Court's position on the question, Mr. Justice DOUGLAS says:

It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the *Clerks* case and in the *Virginian Ry. Co.* case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforceable by judicial decree to only some of its phases. The contention, however, is that the rule which Congress intended to govern can be found from the implications of the Act. Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive also suggest that Congress intended to write into the Railway Labor Act a restriction on the rules and working conditions concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." That expresses the basic philosophy of § 2, Ninth. But that decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy. It does not suggest that the respective domains for two or

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more overlapping crafts should be litigated in the federal district courts.

It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers, but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread.

Mr. Justice JACKSON concurred in the result and Mr. Justice ROBERTS and Mr. Justice REED were of the view that the Court should entertain jurisdiction of the case for the reasons set out in the dissent in No. 48.

This case was argued by Mr. John W. Madden, Jr., and Mr. Harold N. McLaughlin for the Brotherhood Adjustment Committee and by Mr. Harold C. Heiss for General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen and by Mr. Lucien Touchstone for the railroad company.

No. 41, *General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen v. General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company* is decided upon the authority of the Missouri-Kansas-Texas case.

In No. 27, *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company (An Unincorporated Association), v. Southern Pacific Company and General Grievance Committee of the Brotherhood of Locomotive*

*Firemen and Enginemen (An Unincorporated Association)*, a related question was considered. It concerned a dispute as to which union is the proper representative to handle an *individual* as distinguished from a *craft* dispute with the railroad. No question was involved as to representation before a governmental tribunal. Here also the Court concludes, in an opinion by Mr. Justice DOUGLAS, that the question is not for determination by the federal courts.

Mr. Justice JACKSON concurred in the result.

Mr. Justice ROBERTS and Mr. Justice REED dissented on the grounds set forth in the dissent in No. 48.

Nos. 27 and 41 were argued by Mr. Clarence E. Weissell for the General Committee of Adjustment of the Brotherhood of Engineers and by Mr. George M. Maus; by Mr. Burton Mason for the Southern Pacific Company; and by Mr. Donald Richberg for the General Grievance Committee of the Brotherhood.

### Securities Act of 1933—Scope of Term "Security"

Under the Securities Act of 1933, contracts for the sale of oil leaseholds by the acre are not necessarily excluded from the scope of the Act by its definition of "security" to include sales of oil leaseholds by undivided shares.

*Securities and Exchange Commission v. C. M. Joiner Leasing Corporation and C. M. Joiner*, 88 L. ed. Adv. Ops., 62; 64 Sup. Ct. Rep. 120; U. S. Law Week 4019. (No. 24, argued October 18, 1943, decided November 22, 1943).

This opinion deals with the scope of the term "security" as used in § 2(1) of the Security Act of 1933. It provides as follows:

The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant of right to subscribe to or purchase, any of the foregoing.

The respondents were engaged in a campaign to sell assignments of oil leases, mailing their solicitation material into eighteen states and the District of Columbia. The sales literature failed to mention the difficulties and cost with which the purchaser would be faced if he undertook to develop his own acreage, but on the other hand, assured the prospect that the Joiner Company would complete the drilling of a test well so located as to test the oil-producing possibilities of the leaseholds offered for sale. In a suit to enjoin further violations, the district court denied relief and the circuit court of appeals affirmed, upon a construction of the statute which excludes from its scope all trading in oil and gas leases. On certiorari this was reversed by the Supreme Court in an opinion by Mr. Justice JACKSON.

The respondents' scheme was found to be fraudulent

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by both of the lower courts. The undisputed facts with reference thereto are summarized in the opinion of Mr. Justice JACKSON as the basis for his conclusion that the respondents were not offering naked leasehold rights, but rather leasehold rights into which was woven both in an economic and legal sense an undertaking to drill exploration wells. The Court's conclusion that the respondents were offering more than leasehold rights is thus explained:

Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition. Purchasers then would have been left to their own devices for realizing upon their rights. They would have anticipated waiting an indefinite time, paying delayed drilling rental meanwhile until some chance exploration proved or disproved the productivity of their acres. Their alternative would have been to test their own leases at a cost of \$5,000 or more per well.

But defendants offered no such dismal prospect. Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. The drilling of this well was not an unconnected or uncontrolled phenomenon to which salesmen pointed merely to show the possibilities of the offered leases. The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense; the undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung.

• • •

Whether, as the dissenting judge below suggests, the assignee acquired a legal right to compel the drilling of the test well is a question of state law which we find it unnecessary to determine. The terms of the offering as quoted above, either by itself or when read in connection with the agreement to drill as consideration for the original lease, might be taken to embody an implied agreement to complete the wells. But at any rate the acceptance of the offer quoted made a contract in which payments were timed and contingent upon completion of the well and therefore a form of investment contract in which the purchaser was paying both for a lease and for a development project. Without the drilling of the well, no one's leases had any value, and except for that undertaking they had been obtained at no substantial cost. The well was necessary not only to fulfill the hopes of purchasers but apparently even to avoid forfeiture of their leases.

The opinion then deals with the construction of the statutory definition, saying:

In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security." We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as matter of

law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a security." The proof here seems clear that these defendants' offers brought their instruments within these terms.

It is urged that because the definition mentions "fractional undivided interest in oil, gas or other mineral rights," it excludes sales of leasehold subdivisions by parcels. Oil and gas rights posed a difficult problem to the legislative draftsman. Such rights were notorious subjects of speculation and fraud, but leases and assignments were also indispensable instruments of legitimate oil exploration and production. To include leases and assignments by name might easily burden the oil industry by controls that were designed only for the traffic in securities. This was avoided by including specifically only that form of splitting up of mineral interests which had been most utilized for speculative purposes. We do not think the draftsmen thereby immunized other forms of contract and offerings which are proved as matter of fact to answer to such descriptive terms as "investment contracts" and "securities."

Mr. Justice ROBERTS voted to affirm the judgment. Mr. Justice DOUGLAS did not participate in the decision.

The case was argued by Mr. John F. Davis for the SEC and by Mr. David A. Frank for the corporation.

### Labor Law—Picketing—Injunction

The owners of a cafeteria who themselves carried on the business without the aid of any employees are not entitled to an injunction against peaceful picketing by an employee union, even though the trial and reviewing courts found that the representatives of the pickets were knowingly false, that the cafeteria owners were not unfair to labor, and that no labor dispute was involved, since no labor was employed.

*Cafeteria Employees Union, etc., et al. v. Angelos, et al.; Same v. Tsakires*, 88 L. ed. Adv. Ops. 60; 64 Sup. Ct. Rep. 126; U. S. Law Week 4036. (Nos. 36-37, argued November 8, 1943, decided November 22, 1943.)

The New York Supreme Court enjoined an employee's union from picketing two cafeterias. The appellate division affirmed. The court of appeals sustained the lower state courts, the chief judge and two judges dissenting. Certiorari was allowed "to determine whether the injunctions . . . exceeded the bounds within which the Fourteenth Amendment confines state power."

The two cases being "substantially alike" were argued together, disposed of in a single opinion, and the judgments in both cases were reversed and the cases remanded.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER, who states the facts of the case as follows:

We start with the court of appeals' view of the facts. In No. 36, petitioners, a labor union and its president, picketed a cafeteria in an attempt to organize it. The cafeteria was owned by the respondents, who themselves conducted

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the business without the aid of any employees. Picketing was carried on by a parade of one person at a time in front of the premises. The successive pickets were "at all times orderly and peaceful". They carried signs which tended to give the impression that the respondents were "unfair" to organized labor and that the pickets had been previously employed in the cafeteria. These representations were treated by the court below as knowingly false in that there had been no employees in the cafeteria and the respondents were "not unfair to organized labor". It also found that pickets told prospective customers that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism".

Citing and distinguishing the *Senn* case, Mr. Justice FRANKFURTER says:

In *Senn v. Tile Layers Union*, 301 U. S. 468, this Court ruled that members of a union might, "without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." . . . Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. . . . To be sure the *Senn* case related to the employment of "peaceful picketing and truthful publicity" . . . That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "Fascist"—is not to falsify facts. Certainly, in a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives.

*A. F. of L. v. Swing* is cited and applied and of the *Meadowmoor* case Mr. Justice FRANKFURTER says:

The present situation is thus wholly outside the scope of the decision in *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." 312 U. S. at 296. Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.

The case was argued by Mr. Louis B. Boudin for the union and submitted by Mr. Abraham Michael Katz for Angelos and Tsakires.

### Taxation—Estate Tax Deduction for Charitable Bequests—Income Tax Deduction, Trust Income Held for Charity

A remainder bequest to charity is not deductible in determining the net estate where the trustee is empowered to divert corpus to the income beneficiary for her comfort, support, maintenance and happiness and where the trustee is directed to exercise its discretion with liberality to the income beneficiary. For income tax purposes, profits from the sales of the estate's securities cannot be deducted as amounts held for the benefit of the charity remaindermen.

*Merchants National Bank of Boston, Executor v. Com-*

*missioner of Internal Revenue*, 88 L. ed. Adv. Ops. 55; 64 Sup. Ct. Rep. 108; U. S. Law Week 4011. (No. 30, argued October 19, 1943, decided November 15, 1943.)

The taxpayer was the trustee under a will which provided that the income be paid to the decedent's widow for her lifetime and the remainder to named charities; the trustee was authorized in its discretion to invade the corpus in order to pay additional amounts to the widow for her "comfort, support, maintenance, and/or happiness". The testator admonished the trustee to exercise its discretion "with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." The estate claimed and the Commissioner disallowed a deduction representing a value of the remainder interest; likewise, the Commissioner refused to allow for income tax purposes a deduction of profits realized from the sales of securities, claimed by the estate as amounts set aside for charity. The Board of Tax Appeals (now The Tax Court) upheld the taxpayer; the court of appeals (C.C.A. 1) reversed the Board and the Supreme Court granted certiorari because of an asserted conflict. The judgment of the court of appeals was affirmed in an opinion by Mr. Justice RUTLEDGE.

Section 303 of the Revenue Act of 1926 (*cf.* Section 812 (d) of the Internal Revenue Code) provides:

. . . value of the net estate shall be determined . . . by deducting from the value of the gross estate—

\* \* \*

(a) (3) The amount of all bequests . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . .

There was no question that the remaindermen were charities; the issue was whether the charitable bequests had at the time of the testator's death a "presently ascertainable" value. Article 44, Treasury Regulation 80, 1934 ed., provided that to sustain a deduction of a trust having both charitable and private purposes the uses must have presently ascertainable and severable values. These regulations were considered by Mr. Justice RUTLEDGE to be appropriate implementations of the statute; they had been in effect under successive reenactments of the statute. The testator preferred to insure the comfort and happiness of the private legatees with the result that the present value of the charitable remainder became less readily ascertainable. "Since, therefore, neither the amount which the private beneficiary will use nor the present value of the gift can be computed, deduction is not permitted."

The taxpayer had the burden of establishing and failed to establish that the amounts which might be spent by the private beneficiary were accurately calculable. The widow's "happiness" was among the factors which had to be considered by the trustee. Her previous mode of life and her own substantial resources, Mr.

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Justice RUTLEDGE said, did not create a sufficiently reliable measure of possible expenditures.

The income tax statute, Section 162 I.R.C., requires that gross income be "... paid or permanently set aside" for charitable purposes in order to secure a deduction. Mr. Justice RUTLEDGE said that there certainly was not more occasion for income tax purposes than in the case of the estate tax "to permit deductions of sums whose ultimate charitable designation is so uncertain."

Justices DOUGLAS and JACKSON dissented, the former writing a dissenting opinion. *Ithaca Trust Company v. United States*, 279 U. S. 151, 154, was cited to show the rule that the deduction was permissible if on the facts the amount of the charitable gifts is affected by "no uncertainty appreciably greater than the general uncertainty that attends human affairs." Mr. Justice DOUGLAS said the Tax Court applied that test and its findings were supported by substantial evidence.

The Court "may modify or reverse such a decision only if it is 'not in accordance with law.' ... We should let that factual determination of the Tax Court stand, even though we would decide differently were we the triers of fact."

The case was argued by Mr. Edward C. Thayer for the executor bank and by Mr. Arnold Raum for the Commissioner.

### Taxation—Equitable Recoupment—Jurisdiction of the Board of Tax Appeals

In a proceeding to determine a deficiency in federal income taxes, the Board of Tax Appeals has no jurisdiction to determine and apply, by way of recoupment, a prior year's overpayment.

*Commissioner of Internal Revenue v. Gooch Milling & Elevator Company*, 88 L. ed. Adv. Ops.—; 64 Sup Ct. Rep. 184; U. S. Law Week 4042. (No. 53, argued November 12, 1943, decided December 6, 1943.)

The taxpayer corporation undervalued its opening inventory for 1936 and the Commissioner determined a deficiency in income tax. A corresponding inventory adjustment for 1935 would have indicated an overpayment of tax for 1935, but the refund was barred by the statute of limitations. The taxpayer appealed to the Board of Tax Appeals for a redetermination of the 1936 deficiency and sought to have the 1935 overpayment applied by way of recoupment. The Board refused such relief. The court of appeals (C.C.A. 8) reversed and the Supreme Court granted certiorari. The judgment of the court of appeals was reversed, Mr. Justice MURPHY delivering the opinion.

The Board of Tax Appeals (a later change in name to The Tax Court of the United States did not affect its jurisdiction, powers or duties. See Section 504, Revenue Act of 1942) "is but 'an independent agency in the Executive Branch of the Government.'" 53 Stat. 158, 26 U.S.C. § 1100. By Sections 272 and 322

of the Internal Revenue Code, the Board is confined to a determination of the amount of deficiency or overpayment for a year as to which the Commissioner has determined a deficiency.

The Court said in part:

We are not called upon to determine the scope of equitable recoupment when it is asserted in a suit for refund of taxes in tribunals possessing general equity jurisdiction. Cf. *Bull v. United States*, 295 U. S. 247; *Stone v. White*, 301 U. S. 532. But its use in proceedings before the Board is governed by the circumscribed jurisdiction of that agency. The Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction. Until Congress deems it advisable to allow the Board to determine the overpayment or underpayment in any taxable year other than the one for which a deficiency has been assessed, the Board must remain impotent when the plea of equitable recoupment is based upon an overpayment or underpayment in such other year.

The case was argued by Miss Helen R. Carloss for the Commissioner and by Mr. D. M. Kelleher for the Gooch Company.

### RECENT PUBLICATIONS

I CAN GO HOME AGAIN, by Arthur G. Powell. 1943. Chapel Hill: The University of North Carolina Press. Pp. 301. \$3.

INTERNATIONAL BEARINGS OF AMERICAN POLICY, by Albert Shaw. 1943. Baltimore: The Johns Hopkins Press. Pp. x, 492. \$3.50.

AMERICAN CONSTITUTIONAL DEVELOPMENT, by Carl Brent Swisher. 1943. Boston: Houghton Mifflin Company. Pp. xiii, 1079. \$4.50.

WHERE'S THE MONEY COMING FROM? PROBLEMS OF POSTWAR FINANCE, by Stuart Chase. 1943. New York City: The Twentieth Century Fund. Pp. ix, 179. \$1.

THE FUTURE OF SOUTH-EAST ASIA: AN INDIAN VIEW, by K. M. Panikkar. 1943. New York: The Macmillan Company. Pp. 126. \$1.75.

FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS 1943-44, by Robert H. Montgomery. 1943. New York: The Ronald Press Company. Pp. xii, 821. \$7.50.

HANDBOOK OF THE LAW OF BILLS AND NOTES (Hornbook Series), by William Everett Britton. 1943. St. Paul: West Publishing Co. Pp. xx, 1245. \$5.

THE CONSTITUTIONAL GOVERNOR, by Casimir W. Ruskowski. 1943. Boston: Bruce Humphries, Inc. Pp. 61. \$2.

STREET CORNER SOCIETY, THE SOCIAL STRUCTURE OF AN ITALIAN SLUM, by William Foote Whyte. 1943. The University of Chicago Press. Pp. xxii, 284. \$3.

ALEXANDER JAMES DALLAS, LAWYER, POLITICIAN—FINANCIER, 1759-1817, by Raymond Walters, Jr. 1943. Philadelphia: University of Pennsylvania Press. Pp. vi, 251. \$2.50.

## BOOK REVIEWS

*Patent Property and the Anti-Monopoly Laws*, by Otto Raymond Barnett. 1943. Indianapolis: The Bobbs-Merrill Company. Pp. xxxi, 662. \$10.—Mr. Barnett, long an outstanding voice in the councils of the Section of Patent, Trade-Mark and Copyright Law of the American Bar Association, in his work, *Patent Property and the Anti-Monopoly Laws*, has presented one of the few discourses on the highly controversial and little understood conflict presently raging in the courts and the legislative halls, on the relative zones of influence on American economy of the patent and anti-trust statutes.

The book deals with the subject as exhaustively as the present state of case law, interpretive of the conflicts between the two sets of statutes, will permit and ventures into the realm of prediction, not only as to the probable trend of decisions, but also as to the pitfalls of the present apparent movement in the direction of restriction of the property right in invention, by increasing expansion of the application of the anti-trust laws through ever-broadening judicial interpretation.

Mr. Barnett has set forth the historical development of both the lines of statute and the case law bearing thereon in what is probably a more comprehensive form than has as yet been undertaken by any author in this field. In view of the sparsity of consideration of the subject in comprehensive fashion among authors, *Patent Property and the Anti-Monopoly Laws* commends itself to every lawyer called upon to deal in contractual relationships and litigation involving inventions and patents, and will, no doubt, prove particularly helpful to the practitioner who is faced with rendering opinions bearing upon the scope and limitations on the exploitation of patents, and particularly the sub-division of patent property through the devices of license, patent pooling, and similar methods commonly adopted for enhancing wide-scale enjoyment of inventive concepts by industry, the art, and the public, with profit and encouragement to the patent owner.

The work first directs itself to an over-all survey of the patent system, its underlying purpose, and the constitutional intention that the progress in science and the useful arts is best secured by limited exclusive enjoyment of each inventive step in the development of the industrial economy by application of the intellectual concept. After discussing the background of the patent statutes, the anti-monopoly laws are similarly analyzed, following which Mr. Barnett has reviewed with care, licensing practices and patent combinations, both as approved and as denounced by the courts, the relationship of the anti-monopoly laws to patent infringement litigation, and finally the inherent attack on the patent system as is developed through modern

decisions of the courts and the activities in the past few years of the Department of Justice, both in "anti-trust" litigation and before various committees of Congress.

Not the least valuable contribution of the text is its appendix, setting forth the respective views of the proponents and opponents of the patent system. From a reading of the appendices, particularly in the light thrown thereon in the discussion furnished by Mr. Barnett, the relatively complex issues of the apparent conflicts between the patent laws and the anti-trust laws are brought into full relief.

ROY C. HACKLEY, JR.

Washington, D. C.

*James Moore Wayne, Southern Unionist*, by Alexander A. Lawrence. 1943. Chapel Hill: The University of North Carolina Press. Pp. xiv, 250. \$3. — More nearly than most institutions the Supreme Court conforms to the Carlylean dictum that its history is the essence of the biographies of those who have been and are its members. The votes and opinions of the justices determine the course of its history and the explanation of those votes and opinions is to be found in environment, training, experience, personality and the other factors that influence the actions of men. Only when there are available adequate biographies of all the justices shall we be able fully to understand in every instance the reasons that wrought the result.

In writing one of these biographies, Mr. Lawrence, himself a practicing member of the Savannah Bar, has made a definite contribution to this task of American legal scholarship.

Justice James M. Wayne, a native of Savannah, served for more than thirty-two years (1835-1867). He was the first justice born under the Constitution and the last survivor of Marshall's colleagues and of Jackson's appointees.

Himself a slaveowner he is believed to have persuaded Chief Justice Taney that it was the Court's duty to pass on the merits of the *Dred Scott* case. Certain it is that he was the only justice who concurred "entirely in the opinion of the Court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions."

Not only by his vote and opinion in this case but by standing for a strict enforcement of the Fugitive Slave Law and in other ways did Justice Wayne demonstrate his friendliness to slavery. He was impatient of abolitionism and of what he considered the aggression of the North.

Nonetheless he was a strict Unionist, consistently favoring the extension of federal power, and when seces-

sion came he stood by the Union and retained his place on the Bench. Indeed, he held the view now long discarded that the Southern people were rebels and their leaders traitors. Wayne's action was in dramatic contrast with that of his son. Major Henry C. Wayne, who was a graduate of West Point, resigned his commission in the United States Army to follow the fortunes of his native Georgia in whose service he became Adjutant General.

Mr. Lawrence's presentation of the facts makes the action of each of these men entirely understandable. Nor does he leave one in doubt as to the accuracy of his factual statements. Not only has he gone to original sources for Wayne's career as a justice and as a representative in Congress where, an ardent supporter of Jackson, he served three consecutive terms but—a much more arduous task—he has adhered to the same practice in following Wayne in Georgia politics, where he bitterly opposed nullification, and on the Bench in that state.

For the lawyer-reader at least, the most admirable part of the volume is that which clearly and succinctly synthesizes the decisions and opinions in which Wayne participated and relates him to them. It would be difficult to improve upon this reporting which is done in such a way as to furnish a complete key to Wayne's public life.

It is a temptation to quote or to abstract Mr. Lawrence's story, but the book itself is brief and it is sufficient to say that it should be read by every lawyer interested in American constitutional history, for no other rivals it in setting a Jacksonian jurist against so wide a background of slavery, the War Between the States and Reconstruction.

Charles J. Bonaparte, *Patrician Reformer: His Earlier Career*, by Eric F. Goldman. 1943. Baltimore:

The Johns Hopkins University Press. Pp. 150. Paper, \$1.50.—Charles J. Bonaparte was a unique personage not only in American public life but on the American scene. While that uniqueness stemmed from the fact that he was the grandson of Jerome, King of Westphalia, and grandnephew of the Little Corporal, his own characteristics did not lessen it or tend to make him a typical American.

The inheritor from his grandmother of an ample fortune consisting chiefly of real estate, he was graduated from Harvard College and Harvard Law School and practiced law in a somewhat desultory way in Baltimore.

His zeal for civil service reform brought him in contact with Theodore Roosevelt with whose dislike for anything savoring of plutocracy he was in entire sympathy. The resulting friendship shaped his subsequent career.

Roosevelt, after using him as a "trouble shooter" for investigating conditions in the Indian Territory and prosecuting postal frauds, appointed him first Secretary of the Navy and later Attorney General.

The present volume, which is one of The Johns Hopkins University Studies in Historical & Political Science, is an adequate, scholarly, well documented and readable account of Bonaparte's career up to the time he became Attorney General.

It is chiefly valuable for the light it sheds upon the difficulties encountered by a civilian secretary in administering the Navy Department and for its demonstration of Roosevelt's early recognition of the Japanese menace.

It is unfortunate that circumstances prevented Dr. Goldman from completing his study, for Bonaparte will be remembered largely because of his "trust-busting" record as Attorney General.

WALTER P. ARMSTRONG

Memphis, Tennessee

## In the Kaleidoscope of Peace-Planning

WHILE most of the books on post-war problems are written by individuals endeavoring to solve the troublesome questions by the application of their own specialized technique, some attempts have been made to centralize individual efforts into a spotlight able to penetrate into the darkest corners of our complicated world. In the field of international relations, as in many other fields, no man is able to see all the implications of each proposed solution, and only an analysis by a group of experts of different training and experience is able to iron out the wrinkles.

In the general effort to build a better future, an important role must be assigned to the teachers of inter-

national law. The *Proceedings of the Seventh Conference of Teachers of International Law and Related Subjects*, held in Washington, D. C., in April 1941 (Carnegie Endowment for International Peace; 1941; pp. xiv, 210; \$1.00), testify to the growing feeling of group responsibility and to the willingness to explore subjects of not only professional but also general importance. The discussion of the relation between democracy and totalitarianism, on one hand, and world organization, on the other hand, is especially enlightening. Most of the speakers laid stress on the fact that national and international planning, in both legal and economic spheres, are interdependent, and that a strong international system able to restrain aggression and assure

economic security should be set up (pp. 4, 82-83, 88).

### Building up an International System

The establishing of a general international organization after the present war will be facilitated to a great extent by the possibility of drawing upon the experience of the League of Nations, which represents the greatest attempt yet to conduct world affairs through orderly procedures. One of the best balance sheets of that great experiment is contained in *World Organization*, a collection of papers read before the Institute of World Organization, held at the American University in Washington, D. C., in September 1941 (American Council on Public Affairs; 1942; pp. xiv, 426; \$3.00). Though the contributions to this symposium came mostly from high officials of the League and persons closely connected with its institutions and endeavors, all are objective and critical, and on a high level. They contain not only the recital of pertinent facts and their analysis but also valuable suggestions for the future. Particularly stimulating are the chapters on political and economic problems, by A. Sweetser and M. A. Heilperin, respectively.

### Independence of the Americas

There are two possible approaches to inter-American problems. Some writers stress the interdependence of the Americas, others the need for their independence from other continents. The Harris Foundation Lectures on *Inter-American Solidarity* (edited by W. H. C. Laves; University of Chicago Press; 1941; pp. xiv, 228; \$1.50) are representative of the second approach. The most interesting are the contributions of the Latin American members of the panel and Frank Scott's lecture on Canada's role in the Western Hemisphere. H. Portell Vilá presents his views upon the possibilities of "transculturation", i.e., of the exchange of cultural values and elements (pp. 6-10). E. Villaseñor gives an analysis of the economic advantages of the export of North American capital to Latin American countries, aimed at developing their resources and not at impairing their independence. A strong and searching indictment of present American policies by D. Samper Ortega shows how much patience and good will is still necessary to supplement the good-neighbor policy in the political sphere with its economic corollary.

### Old Problems and New Methods

Each peace settlement has to deal with similar problems and to overcome the same hurdles. The tendency to imitate the solutions of the past is very strong, therefore. But that method does not appeal to those who think that a new order is being born requiring a new approach and a different system of law and organization. The essays collected in the volume *Problems of Post-War Reconstruction* (edited by H. T. Jordan; American Council on Public Affairs; 1942; pp. xx, 292), a result of discussions held in the Graduate School of New York University, lean strongly towards the latter approach. Both European and American problems are analyzed,

international as well as internal, with stress on their economic and social aspects. While most of the proposals would be sound in a well organized world, the authors seem to pay but little attention to the fact that we are still far away from such a world, which could be organized on the suggested lines only by abolishing the great powers. Those who wield power are loath to abandon it, especially just for the fun of trying something new and original. Small problems can be solved in a radical manner, big ones only through evolution. But even evolutionists will find food for thought in this volume and a few beacons to set their course by, especially in the essays written by C. Eagleton, Ch. Hodges, E. Hula, D. W. McConnell and H. Pinney.

### World Citizenship

Similar in substance, though different in technique of presentation, is the record of the conference held at Lake Forest, Illinois, in April 1941, under the auspices of the World Citizens Association, edited skilfully by Henry Bonnet under the title *The World's Destiny and the United States* (Chicago: World Citizens Association; 1941; pp. xx, 309; 50c). The highlights of discussion centered around the protection of rights of individuals in the international order through world citizenship and social and economic justice. Far-reaching proposals have been put forward to achieve that aim. The Conference's conclusions with respect to educational and cultural problems are less determined, and the discussion of international organization resulted only in a set of questions (p. 178). The necessity of supplementing the world citizenship with world organization is followed up in two other books written by H. Bonnet, and published by the same organization. In *The United Nations, What They Are and What They May Become* (1942; pp. viii, 100; 25c), Mr. Bonnet traces the evolution of the United Nations organization through the medium of different committees and councils, and advocates the establishment of a Supreme Council. In *The United Nations on the Way* (1942; pp. x, 170; 50c), he evaluates the organizational procedures required for the fulfilment of the "Four Freedoms" and of the promises of the Atlantic Charter.

In all the discussions the participants seem to have agreed on one point. An international organization, universal in character, should be created. But a vast disagreement exists as to the aims and powers of such an organization. The answer to the latter problem might be that "even poor organization can work with good will; the best organization will not work without it" (A. Sweetser, in *World Organization*, p. 41). Not perfect documents, but a strong will to collaborate and a persevering support of organs established for facilitating the collaboration—this is what the world needs most.

LOUIS B. SOHN

Cambridge, Massachusetts

## ADMINISTRATIVE PROCEDURE ACT

(Continued from page 16)

(c) **Orders.**—No administrative order required to be made in conformity with section 4 or otherwise adjudicating legal relations shall either (1) prohibit conduct, require action, authorize the seizure or destruction of property, assess damages, or impose monetary or other penalties in excess of authority expressly conferred by statute or (2) withhold in whole or part moneys, benefits, assistance, remedies, relief, or permissions, or be made subject to terms and conditions or limitations not specifically authorized by law, in any case in which adequate showing of right or statutory entitlement thereto is made.

*Comment.*—Subsection (c) applies the basic limitation of subsection (a) to administrative orders made in the course of administrative adjudication.

(d) **Licenses.**—In addition to the requirements of subsection (c) of this section, no license (including permit, certificate, approval, registration, charter, membership, or other form of permission) shall be required by any agency unless expressly authorized by statute or, when so required, shall in whole or in part be denied or withdrawn, revoked, annulled, or suspended in any case in which lawful entitlement thereto is shown: *Provided, moreover,* that, except in cases of clearly demonstrated wilfulness or those in which public health, morals, or safety require otherwise, no withdrawal of any license or other form of official permission shall be lawful unless, prior to the institution of administrative proceedings therefor, any facts or conduct of which the agency has notice and which may warrant such withdrawal shall have been called to the attention of the licensee or permittee in writing and such person shall have been accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements: *And provided, further,* that no such license or permission shall expire, in any case in which the holder thereof has made due and timely application for a renewal or a new license or permission, until such application shall have been finally determined by the agency concerned.

*Comment.*—The principal clause of subsection (c) requires that the severe burdens of licenses shall not be required or imposed by administrative agencies unless expressly authorized by Congress; and, by prohibiting the denial of licenses where right thereto is shown, removes the grant of licenses from any claim of absolute administrative discretion.

The first proviso is designed to preclude the withdrawal of licenses, except in cases of wilfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency. Similar provisions are now contained in the banking statutes, except that the latter provide that stated periods of time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses (Banking Act of 1933, Secs. 20, 30, and 31, 48 Stat. 162, as amended, 12 U.S.C. 377, 77, and 71a; Federal Reserve Act,

Sec. 13, 38 Stat. 251, as amended, 12 U.S.C. 347; R.S. 5144, as amended, 12 U.S.C. 61).

The second proviso automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, Sec. 154-167, Amended Substitute Senate Bill No. 36).

(e) **Retroactivity.**—No rule or order shall be retroactive in effect unless both so authorized by law and required for good cause; and no such rule or order shall be effective prior to its publication or service unless such effect is both authorized by law and required for good cause: *Provided, moreover,* that required publication or service shall precede for a reasonable time the effective date of the rule or order involved.

*Comment.*—Subsection (e) is designed to place limitations upon the retroactive operation of rules or orders, whether such operation is designed as a penalty or for cause.

**SEC. 9. JUDICIAL REVIEW.**—Except to the extent that there is directly involved any matter subject to a subsequent trial *de novo* or judicial review in any legislative court—

*Comment.*—The foregoing introductory limitation upon the section respecting judicial review is designed to prevent any claim that the section would affect the special review established over administrative agencies through the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, or the Court of Claims. Congress has established those special "legislative" courts to care for the problem of judicial review as to the functions within their jurisdiction, and there is therefore no disposition to supersede or revise their practice or their powers.

(a) **Right of review.**—Notwithstanding any contract, agreement, or undertaking to the contrary, any party adversely affected by any administrative action, rule, or order within the purview of this Act or otherwise presenting any issue of law shall be entitled to judicial review thereof in accordance with this section; and every reviewing court, acting pursuant to this section, shall have plenary authority to render such decision and grant such relief as right and justice may demand in full conformity with this Act and all other applicable law.

*Comment.*—Subsection (a) is designed to state a right of review as to any question of law arising "within the purview of this Act" or any other "issue of law." Except as categories of issues of law are enumerated in subsection (f) below, no attempt is made to define issues of law. Judicial review is traditionally confined to such issues, and the provision makes no attempt to interfere with—or expand—the necessary authority of the courts. The phrase "any party adversely affected" is the language of many statutes, and leaves to the courts the determination of what parties are so affected. The provision thus accords with the findings of the Attorney General's Committee: "There has been little question as to the propriety of judicial review of administrative adjudication" (*Final Report*, p. 75). "Questions of law . . . are subject to full review. . . . The question whether the administrative finding of fact rests on substantial evidence . . . is really a question of law" (p.

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88). "Proposals to define the class of persons who can attack acts of administrative agencies in general are . . . futile because they can hardly go beyond the present generality of persons 'aggrieved' or 'adversely affected'" (p. 85). It should be noted that the authority conferred upon courts to review is limited to "conformity with this Act and all other applicable law."

(b) **Form of action.**—The form of proceeding shall be any special statutory review proceeding relevant to the subject-matter or, in the absence or inadequacy thereof, any applicable form of legal action including actions for declaratory judgment or for writs of injunction, mandamus, or habeas corpus: *Provided, moreover*, that any party adversely affected or threatened to be so affected may, through declaratory judgment procedure with or without prior resort to the issuing agency, secure a judicial declaration of rights respecting the validity or application of any administrative act, rule, or order: *Provided, further*, that any such action for judicial review or declaratory judgment may be brought against one or more of the following: (1) the agency in its official title at the time of the filing of the proceeding, by service upon its highest officer or any member of the body comprising its highest authority, (2) the officer who is the head of, or one or more of the officers comprising the highest authority in, the agency, or (3) any one or more officers enforcing or authorized to enforce the act, rule, or order involved.

*Comment.*—Subsection (b) in its principal clause states the general situation that methods of review are "of two kinds: (a) those contained in statutes and (b) those developed by the courts in the absence of legislation. . . . The non-statutory remedies . . . are available . . . where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved" (*Final Report*, Attorney General's Committee, pp. 80-82).

The first proviso is designed to assure that declaratory judgment procedure will not be held inapplicable to the administrative process. "While this proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields" (*Final Report*, Attorney General's Committee, p. 81). In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that "under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of . . . administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy'" (House Doc. No. 986, 76th Cong., 3d Sess.).

The second proviso adds to present law by permitting review actions, alternatively or jointly against the agency by its official title. Since the agency is the real party in interest and is uniformly defended by public counsel, action against the "nominal defendant" is "formal rather than substantial" and is thus "an anomalous relic of bygone modes of thought" (*Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 278, 382 [1933]).

(c) **Courts and venue.**—The review guaranteed by this title may be had upon application to the courts named in statutes specially providing for judicial review or, in the absence or inadequacy thereof, to any court of competent jurisdiction: *Provided, moreover*,

that, in any case in which a court shall hold that it is without jurisdiction on the ground that application should have been made to some other court, it shall transmit the pleadings and other papers to a court of competent jurisdiction which shall, after permitting any necessary amendments, thereupon proceed as in other cases and as though the proceeding had originally been filed therein. In any case in which applications for such review are filed, timely amendment shall be permitted to state additional or subsequent facts and seek additional remedies or relief. Any court having jurisdiction of any part of any controversy regarding any administrative action, rule, or order shall have full jurisdiction over all issues in such controversy, with authority to grant all pertinent relief, notwithstanding that some other court may have jurisdiction of some of the issues or parties.

*Comment.*—Subsection (c) is designed merely to carry forward the basic rule stated in subsection (b), with the addition of the proviso to assure that the rights of parties will not be defeated by complicated court and venue provisions of law as pointed out by the Attorney General's Committee (*Final Report*, pp. 92-95, 201-202).

(d) **Reviewable acts.**—Any rule shall be reviewable as provided in this section upon its judicial or administrative application or threatened application to any person, situation, or subject; and, whether or not declaratory or negative in form or substance, any administrative order directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land shall be subject to review pursuant to this section: *Provided, however*, that only final actions, rules, or orders, or those for which there is no other adequate judicial remedy (including the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time), shall be subject to such review: *Provided, moreover*, that any preliminary or intermediate order not directly reviewable shall be subject to review upon the review of final acts, rules, or orders; and any action, rule, or order shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening, or declaratory ruling has been presented to or ruled upon by the agency involved.

*Comment.*—Subsection (d) is designed to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule (*Final Report*, Attorney General's Committee, pp. 85-86; *Shields v. Utah Idaho Central Ry.*, 305 U.S. 177 [1938]; *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U.S. 56 [1939]).

(e) **Interim relief.**—Every reviewing court, and every court to which a case may be taken on appeal from, or upon application for certiorari or other writ

# ADMINISTRATIVE PROCEDURE ACT

to, a reviewing court, shall have full authority to issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review and determination as provided in this section; and any such court shall postpone the effective date of any administrative action, rule, or order to the extent necessary to accord the parties a fair opportunity for judicial review of any substantial question of law: *Provided, moreover*, that, in any case in which any legal right, privilege, immunity, permission, relief, or benefit expires or is denied, withdrawn, or withheld, in whole or in part, statutes conferring administrative authority in the premises shall be construed, to the extent that such courts so order, to grant or extend the relief requested so far as necessary to preserve the status of the parties or permit just determination and full relief pursuant to this section.

*Comment.*—The first principal clause of subsection (e) states the current rule respecting stay orders as to both judicial and administrative judgments. "It is reasonable that an appellate court should be able to prevent injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal" (*Scripps-Howard Radio v. Comm'n*, 316 U.S. 4, 9-10 [1942]).

The second principal clause authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. *Cotting v. Kansas City Stockyards*, 183 U.S. 79, 101-102; *Ex parte Young*, 209 U.S. 123, 145, 147, 163; *Wadley Southern Ry. v. Georgia*, 235 U.S. 651, 662; *Chesapeake & Ohio Railway Co. v. Conley*, 230 U.S. 513, 521; *St. L. I. M. & So. Ry. v. Williams*, 251 U.S. 63, 65; *Oklahoma Operating Company v. Love*, 252 U.S. 331, 337; *Western Union Telegraph Co. v. Richmond*, 224 U.S. 160, 172; *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 295; *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 417; *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19.

The proviso is designed to remedy the technical impasse often pointed out by courts in cases in which administrative agencies have refused to act: "No court can grant an applicant an authorization which the Commission has refused" (*Scripps-Howard Radio v. Comm'n*, *supra*, pp. 10, 14). Only by legislation can the courts be authorized to direct administrative action. The proviso does not confer unlimited authority but empowers courts to act in such situations only "so far as necessary to preserve the status of the parties or permit just determination and full relief pursuant to this section."

(f) **Scope of review.**—With reference to any action or the application, threatened application, or terms of any rule or order and notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement,

the reviewing court shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions of law arising upon the whole record or such parts thereof as may be cited by any of the parties; and, upon such review, such court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of all procedures required by law; or (5) either [a] unsupported by substantial evidence upon the whole record in any case in which the action, rule, or order is required by statute to be taken, made, or issued after administrative hearing or [b] unwarranted by the facts to the extent that the facts in any case, including all administrative adjudications not required by statute to be made upon administrative hearing, are subject to trial *de novo* by the reviewing court.

*Comment.*—A restatement of the scope of review is obviously necessary, lest the proposed statute be taken as limiting judicial review. "The objections to judicial review have been generally not to its availability but to its scope" (*Final Report*, Attorney General's Committee, p. 80). The subsection does not attempt to expand the scope of judicial review, but at the same time care must be taken not to reduce it directly or by implication. Nor is it possible to specify all instances in which judicial review may operate. Subsection (f), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see *Final Report*, Attorney General's Committee, pp. 87 *et seq.*). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U.S. 452, 470 [1910]; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U.S. 541, 547 [1912]; *McFarland, Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, 20 A.B.A.J. 612 and 623, 59 A.B.A. Rep. 326, 333 *et seq.* [1934]) and have also been carried into state practice in part at least as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the states, and the Fifth Amendment applicable to the Federal government (*New York & Queens Gas Co. v. McCall*, 245 U.S. 345, 348 [1917]).

A further word of explanation may, perhaps, be required as to the language of the fifth category. *First*, the words "upon the whole record" are designed simply to assure that the hearing—if one is required by statute—is truly a hearing. If agencies may look only to part of the record of a statutory hearing, and ignore other uncontroverted and incontrovertible evidence, then obviously the hearing is a mere sham, the parties are put to needless expense in participating, and judicial review is nothing more than a form. The language does not, and is not intended to, deprive administrative agencies of authority to judge of the credibility of evidence or to appraise conflicting evidence. *Secondly*, division (a) of the fifth category necessarily limits the substantial evidence rule to cases in

## ADMINISTRATIVE PROCEDURE ACT

which Congress has required an administrative hearing upon which the administrative record may be made. Division (b) of the fifth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler v. Strecher*, 307 U.S. 22, 35 [1939]). It should be noted that subdivision (b), except in the recognition that relevant facts as to adjudications may be presented to courts if there is no statutory administrative hearing, does not attempt to state in what other instances evidence may be presented originally to courts of review—for this subject is one which the courts themselves have not fully settled (see *Final Report, Attorney General's Committee*, p. 87; *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 368, 372 [1936]; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 48 [1936]; *Morgan v. United States*, 298 U.S. 468, 476 [1936]; *Morgan v. United States*, 304 U.S. 1, 14 [1938]; *United States v. Idaho*, 298 U.S. 105, 109 [1926]).

(g) **Appeals.**—The judgments of original courts of review shall be appealable in accordance with existing provisions of law and, in cases in which there is no appeal thereto as of right and probable ground appears that any person has been denied the full benefit of this Act, reviewable by the Supreme Court upon writs of certiorari.

*Comment.*—Subsection (g) is designed to recognize that, "in accordance with existing provisions of law," there may be appeals from original courts of review to higher courts; and that, where there is no appeal as of right to the Supreme Court, review may be had there upon certiorari. The subsection, therefore, simply expresses the existing situation with the additional necessary recognition that denial of the "benefit of this Act" by original courts of review shall be ground for seeking certiorari.

(h) **Other provisions of law.**—All provisions or additional requirements of law applicable to the judicial review of acts, rules, or orders generally or of particular agencies or subject-matter, except as the same may be inconsistent with the provisions of this Act, shall remain valid and binding as shall all statutory provisions specifically and in terms precluding judicial review or prescribing a broader scope of review than that provided in this section.

*Comment.*—Subsection (h) is a recognition that all other provisions of law relating to judicial review shall remain in force so far as not inconsistent with the proposal except however that, where Congress has either forbidden judicial review or has expressed a broader scope of review, special provisions to that effect shall prevail. A broader scope of review may be implied from some of the statutes (see *Final Report, Attorney General's Committee*, p. 90). Judicial review has been forbidden by Congress in few instances including and perhaps limited to, decisions of the Administrator of Veterans' Affairs (48 Stat. 9, 38 U.S.C. 705; 54 Stat. 1193).

**SEC. 10. SEPARATION OF FUNCTIONS.**—No proceeding, rule, or order subject to the requirements of sections 6 and 7 shall be lawful unless with reference to that type of proceeding the agency involved shall have previously and completely delegated either to one or more of its responsible officers or to one or more of

its members all investigative and prosecuting functions (over which the agency or its remaining membership shall thereafter have exercised no control or supervision) and the officers or members so designated shall have had no part in the decision or review of such cases; and, in any agency in which the ultimate authority so subject to sections 6 and 7 is vested in one person, such individual shall wholly delegate such investigating and prosecuting functions to responsible officers and shall similarly so delegate the hearing and initial decision of such cases to examiners or boards of examiners. In the making of rules or consideration of petitions subject to the requirements of section 3, no subordinate officer or employee exercising or supervising investigative or prosecuting functions shall take any part in the decision as to the form or content of any rule or the acceptance or rejection of such petitions: *Provided, however*, that investigating and prosecuting officers or employees may appear and take part in public rule making or adjudication procedures in which all private parties have an equal opportunity to be present and participate; in any complaint or similar paper the agency may appear in name as the moving party; and nothing in this section shall be taken to prevent the supervision, consideration, or acceptance of settlements or adjustments by hearing or deciding officers: *And provided, further*, that every general delegation and separation of functions required of any agency by this section shall be specifically provided in its rules published pursuant to section 2.

*Comment.*—Section 10 is designed to achieve an "internal" segregation of deciding and prosecuting functions. The minority of the Attorney General's Committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions or by a court (*Final Report*, pp. 203-209). The majority, however, took the position that, while "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions" and the "commingling of functions of investigation or advocacy with the function of deciding are . . . plainly undesirable," the situation could and should be remedied "by appropriate internal division of labor. . . . The problem is simply one of isolating those who engage in the activity. . . . Independent hearing [officers] insulated from all phases of a case other than hearing and deciding will . . . go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them" (*Final Report*, 55-57). In lieu of, and until Congress sees fit to provide a greater degree of separation (on the model of the former Board of Tax Appeals, for example), section 10 above proposes to make effective an "internal" separation of functions. The proposal includes the recommendations of the Attorney General's Committee with reference to agencies or departments headed by a

single individual or cabinet officer except that the proposal does not preclude such individual head of an agency from reviewing the initial decisions of examiners or boards of examiners as the Attorney General's Committee suggested (*Final Report*, p. 53).

The provisos are designed to preclude interpretations of the principal portion of the section to prevent essential or desirable participations by the agency itself, to recognize that the provision does not prohibit the appearance of any agency officers or employees in public and formal proceedings, and to require the essential publication of the internal segregation provided by the whole section.

SEC. 11. CONSTRUCTION AND EFFECT.—All provisions of this Act shall be liberally construed to effectuate its purposes; nothing in this Act shall be held to diminish the constitutional rights of any person; and, except as otherwise expressly authorized or required by law, all rules, requirements, limitations, rights, privileges, and precedents relating to evidence or procedure shall apply equally to public officers or agencies and private parties. No administrative action taken or refused, procedure conducted or withheld, or rule or order issued or denied in whole or in part by any agency, as defined herein, shall be lawful unless done in full compliance with all applicable provisions of, and subject to the judicial review provided by, this Act. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. All statutes, rules, or orders are hereby repealed so far as inconsistent with this Act; every agency is hereby granted all necessary authority to comply with the requirements of this Act; and no subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval: *Provided, however*, that sections 6 and 7 shall take effect six months after such approval, the requirement of the selection of examiners through Civil Service shall not become effective until one year after the termination of the present war, and no procedural requirement of this Act shall be mandatory as to any administrative proceeding formally initiated or completed prior to the effective date of such requirement.

*Comment.*—The concluding section of the proposal includes the usual provisions respecting the construction and effect of the measure. The requirement that implied amendments shall be precluded is familiar in federal legislation. It should be noted, moreover, that the effective date of the proposal is postponed for periods of time sufficient to afford agencies ample opportunity to revise their practices as required; and the proposal is not to have retroactive effect as to proceedings "initiated or completed prior to the effective date" of any requirement. The postponement of the selection of examiners through Civil Service until a year following the termination of the war is designed to assure that returning service people may have an opportunity to compete in the selection of examiners.

## AMERICAN CAPACITY FOR SELF-GOVERNMENT

(Continued from page 5)

The notion of a fundamental, natural law, supreme and dominant in the social and governmental relations of men, had taken firm root in the philosophy of thinkers as far back as Aristotle. Perhaps men have held to that conviction as far back as men have observed correctly and thought clearly and analytically. Cicero distinguished between *summa lex*, which existed according to his philosophy always before governments or written law, and *lex scripta*, laws of man's making, which were to be regarded as void if they were contrary to the laws of nature.

In the Middle Ages such great jurists as Baden of France and Suarez of Spain agreed with these views, but went further and held that God had planted a consciousness of these laws in the mind and conscience of man, from which one's understanding of natural rights was derived, and held further that a statute which was contrary to natural justice was *ipso facto* void. Grotius was in general agreement with this philosophy. Coke, Fortescue, and Blackstone agreed. Blackstone held, however, that there was no power to prevent Parliament from violating the supreme law. However, he did not go so far as some of our American commentators have gone who say that the Constitution is what the Supreme Court says it is, or so far as some of the commentators on the British Constitution go who say that the British Constitution may be changed by the British Parliament. Neither of these statements is correct.

### America's Duty is to Preserve Government by Law

There is no power to prevent the British Parliament from enacting a law contrary to the British Constitution, but that violation of the British Constitution does not change the Constitution. It is true that there is no power to prevent an ignorant or venal Supreme Court, if there should come to be such a court, from falsely interpreting or falsely applying the provisions of the Constitution; but the Constitution would remain unchanged. We should merely have to await a happier day when the powers which had been abused and the trusts which had been betrayed would pass to fitter hands.

Your ancestors fired shots which were heard around the world. Their duty was to establish democratic government. It is ours to preserve it. Great is our responsibility. Great is our opportunity.

While our boys are fighting on the battlefields of the world, we must with equal courage, equal patriotism, and equal sacrifice if necessary, reestablish and have for them when they come home, those who do, a democracy worthy of their service and sacrifice. A nation of people bottle-fed and rocked to sleep in the arms of a great federal bureaucracy cannot do the job.

# PROPOSED REVISION OF FEDERAL CRIMINAL LAWS

By CHARLES J. ZINN

Counsel to the Congressional Committee on Revision of the Laws

THE Committee on Revision of the Laws of the House of Representatives, pursuant to the authorization contained in the Legislative Appropriation Act, 1944, is undertaking a thorough review and analysis of the federal laws relating to crimes and criminal procedure with the view of preparing a complete substantive revision of these laws. Elsewhere on this page is set forth a copy of a letter from Honorable Eugene J. Keogh, Chairman of that Committee, to the President of the American Bar Association inviting suggestions from members of the Association. Such suggestions will materially assist the Committee in its efforts to produce a comprehensive but simple restatement and codification of federal criminal laws.

At the present time the principal laws relating to crimes and criminal procedure are found in the United States Code, Title 18, Criminal Code and Criminal Procedure. Additional penal provisions relating to specific subject matters are scattered through approximately 25 other titles of the Code.

One of the factors contributing to the need for the proposed revision is that, except for the Internal Revenue Code which was enacted in 1939 after the need therefor had long been recognized, there is no code of positive law and no system of legislation which requires new bills to be addressed to specific existing laws.

The need for a substantive revision of the criminal laws is the more acute inasmuch as there are no comprehensive annual criminal acts similar to the annual revenue acts which contain most of the amendments enacted during a session. The criminal statutes are often extremely brief and numerous during a session of the Congress.

The first codification of federal criminal laws was enacted in 1873, during the 43rd Congress, as Title LXX of the Revised Statutes, consisting of approximately 225 sections. At that time there were only seven volumes of the Statutes at Large and the Congress revised all of the general and permanent laws contained in those volumes, specifically repealing such laws as were incorporated in the revision.

Almost immediately after the enactment of the Revised Statutes there developed in Congress the practice of enacting new laws affecting, but

not specifically amending or otherwise referring to any particular section of, the Revised Statutes. This has been, in large measure, responsible for the present need for another revision.

Within 16 years after the adoption of the Revised Statutes it became apparent that something must be done to correct that situation with the result that a Commission of three members was appointed by the President pursuant to the Act of June 4, 1897 to revise and codify the criminal and penal laws of the United States. The work of this Commission culminated in the Criminal Code of 1909.

Thereafter, in the absence of a permanent office in Congress charged with the preservation of that code structure, the old practice of enacting indiscriminate superseding laws was revived and we are again faced with the need of a complete revision.

Suggestions with respect to the proposed revision should be addressed to Honorable Eugene J. Keogh, Chairman, Committee on Revision of the Laws, House of Representatives, Washington, D. C.

## HOUSE OF REPRESENTATIVES U. S. COMMITTEE ON REVISION OF THE LAWS WASHINGTON, D. C.

Dec. 13, 1943.

Joseph W. Henderson, Esq., President  
American Bar Association  
1140 North Dearborn Street  
Chicago, Illinois

Dear Mr. Henderson:

Our Committee has been studying the Criminal Laws of the United States (Title 18 of the United States Code) with the view of drafting a comprehensive substantive revision of the Title.

This work, constituting a statutory revision, is entirely independent of the excellent work of the Advisory Committee of the Supreme Court of the United States on its projected "Federal Rules of Criminal Procedure." Both projects are of fundamental importance to the future of the Federal Criminal Law.

We believe that your Association should be informed of our plans so that lawyers who have a particular competence in the federal criminal law may be appropriately consulted.

May we request, therefore, that you ask your members to forward at the earliest opportunity and not later than January 31, 1944, their suggestions for correction, simplification and integration of the Federal Criminal Statutes?

If any inspiration for this great public service were needed, we can find no better keynote than the recent statement of Honorable George Maurice Morris, former President of the American Bar Association that

"A war may be the most absorbing problem of a generation, but the administration of justice is the demanding task of an entire civilization."

Sincerely yours,  
EUGENE J. KEOGH, Chairman

## TAX NOTES

**C**COURSES on the Fundamentals of Federal Taxation, sponsored by the Section of Taxation in conjunction with the Practising Law Institute and local and state bar associations, are now in full operation in a number of cities. The cities in which courses are under way and the enrollment in each city, are as follows: Cincinnati 171; Pittsburgh 254; Dayton 67; Reading 57; Springfield 54; Washington, D. C., 122; Chattanooga 76; Harrisburg 48; Cleveland (estimated) 200; Buffalo (estimated) 160; and Akron 64. The enrollments are continuing to mount and have exceeded all expectations.

The early lectures by prominent tax attorneys have been enthusiastically received, and the printed lecture material, prepared by a group of experts under the general editorial supervision of Professor Erwin N. Griswold of the Harvard Law School, have excited much favorable comment. The topics covered by the pamphlets and the persons who prepared them are: Income Tax in General, Lionel J. Freeman; Gross Income, Arad Riggs; Deductions, Morton Pepper; Exemptions and Credits, Earl B. Breeding; Capital Gains and Losses, Richard G. Moser; Tax Returns, Christian Oehler; Sales and Exchanges, Kenneth W. Moroney; Corporations, John H. Alexander; Partnerships, Estates and Trusts, Alan L. Gornick; Excess Profits Tax, Alger B. Chapman; Estate Taxes, David Oppenheim; Gift Taxes, George Craven; Tax Practice, Howe P. Cochran.

The West Coast is already represented; as a course of twelve weekly lectures to be presented by the Los Angeles Bar Association will com-

mence on January 3. The Seattle Bar Association has decided to present twelve lectures in Seattle and a twelve lecture course will begin shortly in Baltimore. Negotiations are pending for lectures in various cities in other parts of the country.

Concentrated three-day courses will be given in other cities so as to make the lectures available to attorneys throughout the country. These concentrated courses have been found to appeal to attorneys living at some distance from the larger centers of population, and bar associations, law schools and local judges have cooperated in organizing such courses.

Local bar associations desirous of sponsoring the lecture courses should communicate with Weston Vernon, Jr., chairman of the Section of Taxation, 15 Broad Street, New York 5, N. Y., or Harold P. Seligson, Director of the Practising Law Institute, 150 Broadway, New York, N. Y.

### Final Income Tax Return of Decedent

New regulations governing the time for filing final income tax returns for decedents have been issued. A final return for a fractional part of a year beginning and ending in 1943 is due on or before March 15, 1944. When the fractional part of the year covered by the return begins in 1944 or subsequent years, the return is due on or before the fifteenth day of the sixth full month following the close of the fractional part of the year. (T.D. 5306, Nov. 19, 1943.)

### Deductions—Legal Expenses Incurred by Trustees

Legal expenses incurred by trustees may be deductible in computing net income of a trust. In *Mary L. Bingham Trust*, 2 T. C. —, No.

108, Oct. 8, 1943, the Tax Court held (two dissents) that amounts expended by testamentary trustees for attorneys' services rendered in connection with the resistance of proposed tax deficiencies and also in respect of certain problems resulting from the expiration of the trust and the delivery of assets to the legatees were deductible under Sec. 23(a)(1) of the Code relating to the deduction of non-business expenses. In the same case it appears that the parties had stipulated that under Sec. 23(a)(1) expenditures on account of trustees' commissions, office salaries, office supplies and expenses, office rent and tax and financial services were to be allowed as deductions.

### Gross Income—Retirement Annuities Purchased by Employer

A retired employee received annual payments under a group retirement contract purchased and fully paid for by his employer. The employee had not included any part of the cost of the contract in income in the year of purchase or the year in which his rights under the contract became vested. The Tax Court has held in *Charles L. Jones et al.*, 2 T. C. —, No. 117, Oct. 25, 1943, that the annual payments received after retirement are includible in the employee's gross income and no part thereof may be excluded under Sec. 22(b)(2) of the Code relating to the taxation of annuities. It was further held that the employee's prior election to receive less than the amount otherwise payable under the retirement contract in consideration of the continuation of the payments to his wife in the event he should predecease her, did not make the employee taxable upon the full amount which he would have received had he not made such election.

Prepared by Committee on Publications, Section of Taxation: Charles T. Akre, Chairman, Washington, D. C.; Gustave Simons, Howard O. Colgan and Mark H. Johnson, New York City, and Allen Gartner, Washington, D. C. Edited by Weston Vernon, Jr., New York City, Chairman, Section of Taxation.

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# WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

THE Honorable Richard Hartshorne, judge of the Court of Common Pleas, sitting in the Essex County Orphans' Court of New Jersey, handed down an opinion dated November 24, 1943, refusing to admit as a soldier's will a letter written by a soldier purporting to make disposition of his personal estate, signed by him without witnesses, seal or attestation clause. The soldier had been inducted on the 12th of August and released from active duty on the same day until August 26. He wrote the letter on August 20 while still at his home. Subsequently, he reported for active duty and entered upon active military service. The New Jersey statute sanctions wills disposing of personal property in the form here involved if made by a soldier "while in actual military service." The court held that this soldier was not in actual military service within the meaning of the statute. Judge Hartshorne is the chairman of the New Jersey State Bar Association Committee on War Work.

Lt. Col. Milton J. Blake, Chief, Legal Assistance Branch, Office of the Judge Advocate General of the Army, advises under date of November 25 that "in view of the unsettled legal status of absentee marriages, it appeared to be the best policy of this office to suggest to Legal Assistance Officers that soldiers should be advised not to undertake such marriages unless there are special compelling circumstances which can only be solved by immediate marriage and then only if they have been advised of the doubtful legal effect of such action and are willing to take such risk." Colonel Blake calls attention to the fact that in addition to the difficulties encountered under state laws the validity of such marriages involving servicemen may necessarily be passed upon for cer-

tain purposes by several federal agencies some of which may rule one way and the others another. Examples of such agencies would be the Office of Dependency Benefits, the Comptroller General and the Veterans Administration.

W. Louis Frost, chairman of the Committee on War Work of the Rhode Island State Bar Association, has rendered an opinion in the form of a letter under date of November 1, 1943, containing a very interesting review of the authorities and reaching the conclusion that in view of the fact that a common law marriage is not valid in Rhode Island unless the parties cohabit after entering into the marriage contract, there can be no valid proxy or radio-telephone marriage in that state.

Under that section of the Articles of War providing that in time of war persons accompanying the United States Army in the "field" are subject to the Articles of War, the United States armies occupying Eritrea were in the "field" within the meaning of the Articles of War as they were away from their home base on an operational hostile mission. On application for habeas corpus for the release of a civilian in custody in a military prison after sentence by general court martial for theft in Eritrea, the district court can take judicial notice of the occupation of Eritrea by the United States armies. This is the decision of the District Court for the Southern District of New York.

In the Supreme Court of New York, Special Term, New York County, it was held that residence is a matter of intent. The court said, "There is a difference in meaning between residence and domicile, and while these terms are commonly construed as synonymous, they are not

necessarily so. One may have his residence in one place and his domicile in another; as to domicile it is that place in which one has voluntarily fixed his abode with a present intention of making it his permanent home. Residence is a place of abode and is of a temporary character, and the fact that it is such makes it in law no domicile." The question of the residence of an army officer stationed in San Francisco was involved in the case. His wife and children were residing in California and the court held California as the state of residence.

A defendant was indicted and arrested for the offense of "knowingly, willfully and unlawfully" counseling, aiding and abetting registrants under the Selective Training and Service Act "to evade service in the land and naval forces of the United States". After his arrest outside his home he was taken into the house, and without a search warrant the premises were searched. A number of documents were seized, many of them indicating participation by the defendant in anti-war, anti-administration, anti-Jewish, and anti-Catholic agitation. The court said "The willfulness required of one who counsels, aids and abets another to evade service in the land and naval forces of the United States is not a general ideological opposition to war . . . but the evil design to do the particular act denounced." And further, "The protection of a person against unlawful searches and seizures has not been suspended by the war, but extends to persons accused of wartime crimes as well as to others." The defendant's motion to suppress evidence was granted. (The District Court for the Southern District of California, Southern Division.)

# JUNIOR BAR NOTES

By HUBERT D. HENRY

Secretary, Junior Bar Conference

NATIONAL Chairman James P. Economos has announced the completion of state chairmen appointments with the appointment of the following state chairmen:

Michigan—Daniel Hodgman,

Detroit

Nebraska—Donald E. Kelley,

McCook

North Carolina—Charles H.

Young, Raleigh

South Carolina—Carlisle Roberts,

Columbia

Wyoming—E. Byron Hirst,

Cheyenne

The appointments for Michigan and Wyoming are in lieu of those previously announced. The national chairman has also announced the appointment of the following committee chairmen and council advisers: Committee in Aid of the Small Litigant, Earl F. Morris, Columbus, Ohio, chairman, T. Julian Skinner, Jr., Birmingham, Ala., council adviser; War Readjustment Committee, Miss Daphne Robert, Atlanta, Ga., chairman, Lyman M. Tondel, Jr., New York City, council adviser; Committee in Cooperation with Inter-American Bar Association, Fred Much, Houston, Texas, chairman, Walter E. Craig, Phoenix, Ariz., council adviser; Committee on Legal Assistance to the Armed Forces, Park Street, San Antonio, Texas, chairman, Ray Nyemaster, Des Moines, council adviser; Membership Committee, Frederick Sass, Chicago, chairman, Charles A. Kothe, Tulsa, Okla., council adviser; Committee on Relations with Law Students, Robert W. Gwin, Birmingham, Ala., chairman, E. Clark Morrow, Newark, Ohio, council adviser; Committee on Restatement of the Law, Howard P. Cockrill, Little Rock, Ark., chairman, Julius Birge, Indianapolis, Ind., council adviser; Traffic Court Committee Watson Clay, Louisville, Ky.,

chairman, Charles S. Rhyne, Washington, D.C., council adviser.

The Junior Bar Conference has contributed in many ways to the program for the improvement of the administration of justice. In 1940 it undertook the task of preparing reports in each state covering the following topics:

Rules of Court

Managing the Business of Courts

Pre-Trial Procedure

Selection of Persons for Jury Service

Trial Practice

A state reporter was appointed in each state and the District of Columbia, who was responsible for the completion of the reports by himself or through the assistance of others. Each report consists of two parts, an analysis sheet and a narrative report, and has as its objective the obtaining of authoritative information as to the need, status, and advantages of various reforms recommended by the Section of Judicial Administration in 1938. In some states all five parts have been completed and published. Two additional parts, on Appellate Practice and Administrative Tribunals, have been prepared and will be sent to the state reporters for completion, along with any other uncompleted parts, this year. Although this work has been retarded by entrance into military service of many of the state reporters, the National Director hopes to have the work completed this year. Conference Vice Chairman John E. Buddington, Boston, is National Director, and the Associate National Directors are: William N. Etheridge, Jr., Oxford, Miss.; John S. Howland, Des Moines, Iowa; Mrs. Dorothy D. Tyner, Topeka, Kans.; John W. Willis, Washington, D.C.; and Glenn R. Winters, Ann Arbor, Mich. C. Keating Bowie, Baltimore, is council adviser.

The Younger Members Committee of the Chicago Bar Association, which won the Award of Merit for excellence in war work given by the Junior Bar Conference in 1943, represents the 1000 members of the association under age 36. The committee consists of 35 younger members, meeting at luncheon on alternate Mondays in the headquarters of the Chicago Bar Association. The officers of the committee are: Samuel W. Witwer, Jr., chairman; Horace G. Marshall, vice chairman; and Dorothy M. Stalzer, secretary.

Again this year, principal emphasis is upon war work. A sub-committee is in charge of preparing a monthly news article for the *Chicago Bar Record*, "Our Fighting Men", concerning the activities of the 800 members of the Association in the armed forces. Another sub-committee is studying post-war placement of attorneys now in service, reestablishment of law practices, seminars in legal developments and changes in the law during the war, and encouragement of clients to return to their former attorneys.

Other sub-committees are now actively working on such projects as (1) reduction of length and number of reported decisions; (2) formation of sections of younger members to give assistance to other committees of the association in such matters as investigating and prosecuting grievances and complaints and defending prisoners; (3) the entertainment at informal luncheons of newly admitted members of the Bar; (4) preparation of a brochure on association activities; (5) improving administration of justice in traffic courts; (6) photographic contest for association members; (7) new members; (8) social activities, including an annual party or dance for all younger members.

## LONDON LETTER

### Birmingham Regional Meeting

(Continued from page 23)

son opened the last session of the meeting and called for the report of the Resolutions Committee appointed by him at the opening session. Henry Upson Sims, former President of the Association, served as chairman of this committee, and his associates were Frank Young and Francis Hodge. One resolution was presented and unanimously adopted after Mr. Henderson had ruled that it should be construed as a recommendation to be presented to the House of Delegates at its mid-year

meeting in Chicago in February, 1944.

The resolution follows:

BE IT RESOLVED by the American Bar Association in Regional Meeting Assembled in Birmingham, Alabama:

That the Supreme Court of the United States be requested to approve the criminal court rules lately proposed by the committee appointed by the Supreme Court for that purpose, and that upon the approval of such rules by the Supreme Court they be submitted to Congress and enacted into law.

After the report of the Resolutions Committee, President Henderson called to the Chair, Philip J. Wickser, member of the Association's

Committee on Coordination and Direction of War Effort, and Mr. Wickser took over the conduct of further proceedings. The remaining time was devoted to two papers, both under the general heading, "Federal Taxation." The first was entitled, "Legal Problems in Tax Increases for 1943 under the Current Tax Payment Act," and was presented by Merle H. Miller, chairman of the Committee on Federal Income Taxes of the Association's Section of Taxation. The second, "The Excess Profits Tax—Corporate Relief," was presented by Thomas Tarleau, formerly Legislative Counsel, Treasury Department.

## LONDON LETTER

GOVERNMENT permits have recently been granted to the Temple authorities for a certain measure of restoration of the Temple Church. Whatever is done will be of only a temporary nature, the object being to protect what remains of the structure from further depreciation. The Round Church, built by the Knights Templars in the year 1185, is to have a concrete roof, surrounded by a low brick wall, and repairs to the recumbent effigies of the Knights are to be undertaken. With regard to the latter it seems likely that, judged by their present condition, there will be much more of "repair" than original work in the finished articles. It is also intended that some work shall be done on the beautiful Purbeck marble pillars in the choir, which were seriously damaged by the fire which raged within the church. The restoration will be under the supervision of Mr. Herbert Worthington, the architect, who has already given valuable advice as to the reconstruction of the Temple after the war. It will be some time before the work is completed and, even then, there is not much prospect of the Sunday services being resumed as everything in the interior of the church, including the organ, was destroyed.

Recently there has been somewhat of a revival of enemy raids on London although, one is happy to say, not on the scale formerly experienced. The Inns of Court have so far, fortunately, escaped further damage from the few bombs which have been dropped within the London area, but the greatly increased noise of the barrage is sufficient to keep most people awake until the "all clear" is sounded.

I am reminded of an amusing incident which occurred during the bad "blitz" period, in which the Inns of Court suffered such serious damage. On one occasion, after the raiders had passed, one of the residents in the Temple, carefully picking his way over the rubble in Middle Temple Lane, met the Middle Temple's Chief Butler, to whom he remarked that it was a wonderful thing, and one that we had much to be thankful for in view of the devastation caused in the Temple, that there were no fatal casualties. To which the Chief Butler replied "Yes, I agree with you; I have just been having a look around the wine cellars and not a single bottle is broken."

### Duncan Campbell Lee

It is with very much regret that I note the death of Mr. Duncan Camp-

bell Lee, which occurred at Norwich on October 1, 1943, after a long illness. Mr. Campbell Lee was a member of the New York Bar and the United States Supreme Court Bar. He was also a member of the English Bar, having been "called" at the Middle Temple in January, 1917. He had chambers at No. 1 Brick Court and, during the many years in which he was a familiar figure in the Temple, he was justly popular with all members of the Bar with whom he came into constant contact. He gave much of his time to acting as host to the many American lawyers visiting this country, and would spend many hours in showing them the Temple's attractions, which he did with all the enthusiasm and joy of a native of the place. It was due to his energy that the Hardwicke Society—one of the leading legal debating societies in London—was resuscitated when it was on the verge of extinction, and his name appears on the list of its past presidents. While acting as honorary librarian to that society he collected a remarkable "Library of Advocacy" containing state trials, legal biographies, books on advocacy and legal ethics as well as histories of the Bar, Inns of Court and the legal profession. His realization of the traditions and

## LONDON LETTER

dignity of the Bar is expressed in the preface to the Catalogue of the Hardwicke Society's library, which he compiled in 1935, in the following terms: "Behind the Library of Advocacy is the thought that the profession of the law is more than a business. If the advocate does not enlarge his life beyond fees and grasp the inner meaning of his profession and learn to appreciate the part it has played in our social history and endeavor in his own way to exalt that meaning and dignify that part, he will be an inferior form of lawyer and no ornament to a great profession." Campbell Lee will be sadly missed by his many friends.

### Bar Examinations

The results of the Michaelmas Bar Examinations have recently been published and it is remarkable that, in this fifth year of the war a total of 187 students sat in London for the various divisions of the examination. The percentage of successes was higher than usual, except in the final examination, which showed poor results. The result of the Hilary examination held in Prisoner of War Camp Oflag vii B, has also been published and is highly gratifying. It shows that all of the sixteen candidates who sat were successful and that the standard attained was very good. The only two who sat for Roman Law secured first class honours. These results would seem to imply that the conditions obtaining in the camp are much better than those experienced in the last war. Hardship and privation would not be conducive to the mental application necessary to secure such successes.

### Future of the Inns of Court

Now that the military situation seems to justify some optimism concerning the not too far distant termination of the war in Europe, the problem of what is to happen to the Inns of Court is exciting controversy among members of those bodies. It is believed that to restore the Temple alone to anything like its pre-war condition would cost more than

£1,000,000. The restoration of Gray's Inn would also cost a very large sum and Lincoln's Inn, although only slightly damaged by comparison, will need a substantial amount to put it into good shape. With regard to Gray's Inn and the two Temple Societies the finding of the necessary money to defray the cost of rebuilding and repairing is a matter of grave consideration. To help to meet the situation it has been suggested that the four Inns should be amalgamated into two—the Middle and Inner Temples as one, and Gray's Inn and Lincoln's Inn as the other. Although the Inner Temple has already made tentative plans for reconstruction it is felt, by those who are in favour of combining, that the cost of reinstating the Inns as they were would be so heavy that it might not meet with government approval. Certain it is that an amalgamation on the lines suggested would avoid the continuance of the depreciation of effort and expense which has obtained for centuries. At this stage of our development it seems difficult to justify the existence of four separate societies, each one in competition with the others, each with similar rights and liabilities, and all performing similar functions. For many years they have worked in unison to the extent that Consolidated Regulations have been approved as to the admission of students, the mode of keeping terms, the education and examination of students, the calling of students to the Bar, and the taking out of certificates to practice under the Bar. The Council of Legal Education, who are responsible for carrying out these regulations, consists of five Benchers from each of the Inns of Court, and any alterations in such regulations which may be necessary from time to time must be approved by these representatives of each Inn.

Some members of the Bar have even expressed the view that all four Inns should be consolidated, but the difficulties in the way of such a scheme would be almost insuperable. It would be next to impossible to find and acquire a central site large

enough for the purpose, and matters relating to the property of the Inns would be more than difficult to adjust. The first suggestion, however, would be capable of accomplishment. Geographically Gray's Inn is near enough to Lincoln's Inn to avoid inconvenience to members; in fact, Lincoln's Inn, being nearer to the courts, should be an advantage. In the Temple the boundaries of each Society intersect at so many places that comparatively few people could say which is Inner Temple property and which Middle Temple. There is certainly one difficulty which might arise if the rush to join the Inns after the war becomes as great as after the last war and that is the accommodation of all students for the purpose of eating the necessary dinners; but if both halls were restored there should be sufficient room. In any case it would not be difficult to amalgamate the libraries, for the common use of both Inns, on the lines indicated, and such a favourable opportunity is not likely to occur again. These matters form the subject of interesting discussions but, as nothing substantial can be done until after the war, one can only "wait and see."

### Queen Mary and Lincoln's Inn

Queen Mary has honoured Lincoln's Inn by accepting the invitation of the Treasurer and Masters of the Bench of that society to become their Senior Bencher and the first woman Bencher of an Inn of Court. It has, for many years, been the custom of the Inns to seek distinction by enrolling a member of the Royal House as Senior Bencher, and Queen Mary now occupies the office formerly filled by King George V. and the late Duke of Kent. It is not likely that there will be an official function to celebrate the occasion until after the war. The Senior Bencher of the Inner Temple is the King. The Duke of Windsor fills the office in the Middle Temple, and the Duke of Gloucester in Gray's Inn.

S.

The Temple

## Letters to the Editors

To the Editors:

THE Aurelio case has induced discussion of methods of judicial selection. It would be a fine example to the other states if New York should adopt the Wood (American Bar Association) Plan set forth in 1937 A. B. A. Rep. p. 893. It is the best yet evolved for taking the judiciary out of partisan politics. The New York *Herald Tribune*, November 2, said:

It is not compatible with either the usefulness or the dignity of the bench that its members engage in public contests for their posts; their function is not a party function, nor even, in the narrow sense, a political function.

The American Bar Association Plan has not had much support from the lay press. Popular election of judges has not been a "reform." It would be to the public interest if the press would inform the people of the Association's plan for selection of judges, and efforts to induce them to adopt it would be a great public service.

F. W. THOMAS

Asheville, N. C.

To the Editors:

PROMPTED by the publication of the "The War Effort," (Nov. 1943, A. B. A. J., p. 657) and commenting on the "Efforts for this war" by wartime strikers and loafers, I send you the following:

### The War Time Striker—or Loafer!

Though brothers fight and die on foreign soil,

He plays the traitor Judas' role at home;

Though getting more than soldiers' wage for toil,

He strikes! And leaves the soldiers on their own.

Though pledged to do his part against the foe,

He drops his tools! And like a coward—runs.

Though pledged to feed machines where bullets grow—

He lets his brothers fight — with empty guns!

At last in shame we find there breathes the man

With Soul so dead—he aids no heroes' stand

In battle lines—to fight the best they can,

In stout defense of Home and Native Land.

F. G. SWANSON

Tyler, Texas.

To the Editors:

THE American patent system is generally credited with having been largely responsible for the greatest technological development in the world. It has its faults but has of late been bitterly and unjustly attacked by a number of people in "high places."

Two years ago the Supreme Court handed down a decision in which the phrase—"The new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling" and a patent on the Mead Cigar Lighter was found invalid. (*Cuno v. Automatic*, 314 U.S. p. 84).

For some strange reason many inferior courts and several writers have picked out the words "flash of genius" and proceeded to assume that the Supreme Court has shown a new doctrinal trend and that therefore the inferior courts should show less sympathy with patents. This in unwarranted and dangerous.

I am thoroughly familiar with all the issues of fact and law in the *Cuno* case. I have also given most careful study to all the Supreme Court patent cases for ten years prior and for two corresponding periods fifty and forty years earlier. The phrase "flash of genius" is not new and there is nothing in the *Cuno* case or other recent Supreme Court cases to suggest a new doctrinal trend.

It should also be noted that the Court used the opposite terms of "The flash of creative genius not merely the skill of the calling."

In the *Cuno* case the evidence showed that the Mead device was a failure and that years of development by others intervened between Mead and success.

Earlier decisions used the following suggestive requisites of patentability:

|                                  | Year |
|----------------------------------|------|
| "The brilliant thought obtained" | 1848 |
| "The genius of an inventor"      | 1856 |
| "A sudden flash of thought"      | 1868 |
| "A flash of thought"             | 1880 |
| "Something akin to genius"       | 1891 |

and decry the issue of patents for

|   |      |
|---|------|
| "frivolous or foolish" things             | 1825 |
| "every trifling device"                   | 1883 |
| "involves only ordinary mechanical skill" | 1891 |

The patents which have been found invalid by the Supreme Court have been the weak and highly questionable ones which would never have reached the Court if they had been of the type which merits respect.

The November issue of the *Journal of the Patent Office Society* contains a symposium which it seems to me should be called to the attention of your readers.

ROBERT S. ALLYN

New York City

### EDWARD S. BRAGG

(Continued from page 22)

this connection that General Bragg belonged to a generation of lawyers which paid much attention to niceties of procedure and made little discrimination between those legal victories which were won on some fine point of practice and those which were won upon the merits of the controversy."

On his return from Hong Kong he was seventy-nine years of age. Admonished by that inner voice which was to speak years later to Justice Holmes, "the work is never done while the power to work remains," he turned again to his law books. His last brief was filed in the Supreme Court when he was eighty-one. He died at Fond du Lac in 1912 at the age of eighty-five.

## BAR ASSOCIATION NEWS

### State Bar of Michigan

THE eighth annual meeting of the State Bar of Michigan held at Detroit September 16 and 17, 1943, was one of the largest of its kind since the integration of the association in 1935.

Retiring President Dean W. Kelley, in his address to the convention, particularly stressed the need for getting the administrative processes within the scope of adequate judicial review, pointing out that there are certain natural laws expressed in our Constitution, the operations of which have been and always will continue to be the foundation of free institutions; and that regardless of changes in structure in the machinery of government or in the substantive and procedural law, the challenge to a free bar is and will continue to be to keep these natural laws vital and dynamic.

Those attending the convention also listened to a very interesting address by Dr. Hans Leonhardt, who prior to 1938 was an eminent maritime lawyer in the Free City of Danzig. Dr. Leonhardt described the unhappy picture of German jurists as they were forced to pay public subservience to Hitler, and reminded the Michigan attorneys that although Germany's 1919 constitution—one of the most democratic in the world—still is in effect, it has been undermined by a series of minor encroachments through Nazi interpretations and decrees.

Hon. Harry F. Kelly, Governor of Michigan, addressed one of the ses-

sions dedicated in honor of Michigan lawyers in the service of the United States. Governor Kelly pleaded for the preservation of local self-government in this country.

One of the three legal institute sessions was devoted to a discussion of the negotiation, renegotiation and termination of war contracts. These discussions were led by Lt. Col. Robert J. Hesse, chief, legal branch, Detroit Ordnance District, and Lt. Col. Harold Shepherd of Washington, D. C., chief, contract terminations section, legal branch, Office of the Chief of Ordnance.

Another institute session consisted of a panel discussion of some legal aspects of labor relations. Participating in the panel were Albert E. Meder, Philip Arnow, L. J. Carey, Florence Clement Booth, all of Detroit, and Charles Reynard of Cleveland.

The third institute session was devoted to the future of the law of aeronautics. Those attending heard a fine address by Mr. Webb Shadle, of Washington, D. C., general counsel, Civil Aeronautics Administration.

Hon. Herbert F. Goodrich, of Philadelphia, Pennsylvania, judge of United States Circuit Court of Appeals for the Third Judicial Circuit, delivered the principal address at the annual banquet. He spoke lightly but informatively of the interesting legal situations being encountered since the United States Supreme Court decision in the case of *Erie Railroad v. Tompkins*.

The Board of Commissioners of the State Bar of Michigan met November 6, 1943, and elected Charles M. Humphrey, of Ironwood, as president of the State Bar for the year 1943-44. Other officers elected



CHARLES M. HUMPHREY  
President, State Bar of Michigan

were Wilber N. Burns, of Niles, first vice president; Ben O. Shepherd, of Detroit, second vice president; Harry G. Gault, of Flint, secretary; Carl H. Smith, of Bay City, treasurer, and Albert E. Blashfield, of Lansing, executive secretary.

### Ohio State Bar Association

THE program of the American Bar Association Junior Bar Conference, to improve the administration of justice in traffic courts, received momentum in Ohio during the meeting of the Judicial Section of the Ohio State Bar Association on November 4.

The program of the fall meeting of the Ohio State Bar Association at Columbus on November 4 and 5, 1943, included speakers upon subjects relating to present and post-war matters, as well as items of local interest.

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Washington, D. C., addressed the Taxation Section upon "Simplification and Improvement of the Internal Revenue Laws." The Taxation Section adopted a resolution expressing the appreciation of the Section to General Counsel Randolph E. Paul of the Treasury Department of the United States, for his defense of the lawyers against unfounded implications that they selfishly foster complex tax laws and ambiguous regulations thereunder. A second resolution was adopted by the section urging the simplification of the federal income and profit tax laws, to the end that many of the complexities now existing in such laws, both in the computation of taxes and in various technical and administrative provisions, may be eliminated, and commending committees of Congress and the members of the staff of the Joint Congressional Committee on Internal Revenue for their efforts in that behalf.

The Real Estate Section was addressed by Regional Rent Attorney Henry J. Zetzer of Cleveland upon "A Lawyer Views Rent Control from Within and Without."



WAYMON B. McLESKEY  
President, Ohio State Bar Association

"The Financial Responsibility Law—Its Legal Aspects" was discussed before the Insurance Section by James A. Weyer of Cleveland, who advocated the enactment of a Uniform Motorists Financial Responsibility Act and expressed the apprehension that compulsory automobile insurance would be adopted if the present financial responsibility laws do not prove effective.

"Renegotiation of War Contracts" was impartially and ably discussed by Louis A. Lecher of Milwaukee, Wisconsin, who is chairman of the American Bar Association Committee on Commerce. Mr. Lecher outlined the purpose of the congressional enactment, the objections to the statute, the views of war agencies administering the act and the proposed amendments to avoid some of the criticized features of the law.

In speaking upon "The Lawyer's Place in Post-War Planning," Elmer E. Lindseth, executive vice president of the Cleveland Electric Illuminating Company and chairman of the Cleveland Committee for Economic Development, stated that a large majority of the voters of the United States believes that this country has little hope of solving our global and domestic problems unless it provides jobs for its own people after the war; that either business or government must provide the jobs, and that the question of post-war planning is not whether we will provide high level employment, but how.

The Committee on War Effort was authorized to take up with local associations the definition of the services to be rendered to the members of the military forces, determining those which are to be rendered gratuitously and those for which fees may be charged. The association adopted in principle the terms of the Chicago resolution on this subject.

Waymon B. McLeskey of Columbus was elected president of the association for the year 1943-1944, without opposition. J. L. W. Henney of Columbus was reelected secretary-treasurer.

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